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**The Sovereign Acts Doctrine in the  
Law of Government Contracts**

**By**

**Ronald George Morgan**

**B.S. June 1977, U.S. Air Force Academy**

**J.D. June 1985, The Dickinson School of Law**

**A Thesis submitted to  
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**Thesis directed by  
Ralph C. Nash, Jr.  
Professor of Law**

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## I. INTRODUCTION

### A. Nature and Purpose of the Study

Each year the Federal Government enters the world of commerce to both purchase hundreds of billions of dollars worth of goods and services<sup>1</sup> and sell property in its possession.<sup>2</sup> As with most contractual undertakings, the terms of the agreements establish the rights of the parties. But what of those instances where the agreement is silent? Generally, when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."<sup>3</sup> A major distinction exists, however, in that unlike contracts between private parties<sup>4</sup>, government contracts may present the private

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<sup>1</sup>Office of Management and Budget, Budget of the United States Government FY 1992, 102nd Congress, 1st Session, H. Doc. 102-3, Part 7, Table 14.1 (1991). The amounts spent on the acquisition of goods and services was \$417.8 billion in 1990, and estimated to be \$450.8 billion and \$438.9 billion in 1991 and 1992 respectively.

<sup>2</sup>See, e.g., 36 C.F.R. 219.16, providing for the sale of timber in national forests in furtherance of planning and management of the national forest system.

<sup>3</sup>Cooke v. United States, 91 U.S. 389, 398 (1875). Also see United States v. Standard Rice Co., 323 U.S. 106 (1944); Perry v. United States, 294 U.S. 330, 352 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934).

<sup>4</sup>"In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other from carrying out the agreement on his part." Patterson v. Meyerhofer, 204 N.Y. 96, 97 N.E. 472 (1919). Also see: Restatement, Contracts 2d, sec. 205 (1981) (duty of good faith and fair dealing precludes interference or failure to cooperate); 4 Corbin, Contracts sec. 947 (Supp. 1991); 5 Williston, Contracts, secs. 677 and 677A (W. Jaeger 3rd ed. 1961); Patterson, Constructive Conditions in Contracts, 42

contractor with an unrecoverable loss resulting from the acts of the "Government" in its sovereign capacity under the sovereign acts doctrine.<sup>5</sup>

While most citizens, and the uninitiated contractor, may perceive the Government as a monolithic entity, the law does not share this perception.<sup>6</sup> Not only do the different agencies comprise different entities, the same agency may fulfill

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Colum. L. Rev. 903 (1942) (where the author provides an historical and critical survey of the requirement of cooperation at pp. 928-42).

<sup>5</sup>The term sovereign acts doctrine and sovereign acts defense are used interchangeably. The former term indicates the rule's status as a tenet of law. The latter indicates its legal application. See infra notes 22 through 25 and accompanying text regarding the distinction between this principle and that of sovereign immunity.

<sup>6</sup>The United States is not "like a single party moving with a single will." Reynolds Metals Co. v. United States, 194 Ct. Cl. 309, 317-18 (1971) ("most favored seller agreement" cannot be read to bind other executive agencies, let alone other branches of Government). Nor is the Government a "monolithic body where the activities of the separate agencies or departments are involved." U.S. Flag & Signal Co., ASBCA No. 27049, 83-1 BCA para. 16,196 (1983) (Imputing the knowledge of one agency to another is impermissible). The reason for such a rule was clearly set forth in Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 391-92, 172 F. Supp. 454, 457 (1959), where the court stated "in a business so vast as that engaged in by the United States Government, with its multitudinous departments, bureaus, and independent agencies, with various and sundry projects scattered all over the world, it is impossible for one department to know what another department is going to do." Even when the same department is acting, the knowledge held by different parts of the same department may not necessarily be imputed to the other absent some meaningful connection between the two. See Cryo-Sonics, Inc., ASBCA No. 11483, 66-2 BCA para. 5,890 (1966) (The knowledge of one Air Force Major Command was imputed to another because the contractor had identified to one command the report and name of an engineer in another, but the board cautioned that such imputed knowledge was not automatic).

different roles,<sup>7</sup> in which its own acts create an uncompensated loss for the contractor. This result rests upon the principle that "the Government as a contractor is excused from the performance of its contracts if the Government as a sovereign makes laws, regulations or orders which prevent that performance...."<sup>8</sup> This principle is the heart of the "sovereign acts doctrine" and the subject of all that follows.<sup>9</sup>

In 1963, Professor Richard Speidel posited "while the general risk of some 'sovereign' act may be foreseeable, the precise character of such an act and its impact upon performance are not."<sup>10</sup> More recently, in October 1991, another experienced

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<sup>7</sup>"The two characters which the government possesses as a contractor and as a sovereign cannot be fused." Jones v. United States, 1 Ct. Cl. 383, 384 (1865). "This double character of the Government cannot be lost sight of in any of its transactions." Hawaiian Dredging & Construction Co., ASBCA No. 25594, 84-2 BCA para. 17,290. p. 86,109 (1984). These two characters of the Government is represented by the term "dual capacity." See infra Section II(A)(1).

<sup>8</sup>Froemming Bros., Inc. v. United States, 108 Ct. Cl. 193, 212 (1947).

<sup>9</sup>One commentator has opined that the sovereign acts doctrine is the Government's most frequently asserted defense. Latham, The Sovereign Act Doctrine In The Law of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 29, 30 (1975) (hereinafter Latham). It clearly is one of the two major defenses, the other being exculpatory clauses of the contract itself, asserted by the Government to avoid bearing risk and the concomitant liability that would otherwise be allocated to it. J. Cibinic and R. Nash, Administration of Government Contracts, p. 252 (2d ed. 2d printing 1986).

<sup>10</sup>Speidel, Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts, 51 Geo. L.J. 516, 549 (1963) (hereinafter Speidel). This failure to appreciate what constitutes a sovereign act does not solely afflict the contractor. See e.g., South Louisiana Grain Services v. United States, 1 Ct. Cl. 281 (1982), in which the sovereign acts defense was raised in a motion for summary judgment. The court

observer noted that while the courts and boards have, with some exceptions, generally produced "A" quality results in the cases, those charged with presenting the defense have been less successful in "weeding out the wheat from the chaff."<sup>11</sup> Despite the passage of twenty-eight years between these appraisals, the situation still appears that while the results of a sovereign act are understood, what constitutes such an act, or more simply how to recognize such an act, is still unappreciated.<sup>12</sup>

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found that the sovereign was acting in its contractual capacity and noted that the Government had "improperly mingle[d] the contractual and sovereign capacities of the government." Id. at 287 n.6.

<sup>11</sup>Nash, R., The Sovereign Act Defense: Is It Being Fairly Applied? 5 N&CR para. 55 (October 1991). One explanation for this apparent contradiction lies in the fact that the boards are not bound by the theories raised by the parties, but may base their decisions upon a different theory of relief or defense, providing the facts adequately support this different theory. See Overhead Electric Co., ASBCA No. 25656, 85-2 BCA para. 18026 (1985) (sovereign acts defense raised by presiding administrative judge, who requested briefs on the matter, and the defense was challenged because it had not been asserted by a party). Cf. Technology Chemical, Inc., ASBCA No. 26304, 82-2 BCA para. 15,927 (1982) (issue not raised until government's reply to contractor's request for reconsideration is no bar to raising issue that board could have considered on its own motion). The United States Court of Claims, as does the United States Claims Court, enjoys this same latitude as to issues of law. See J.A. Jones Co. v. United States, 182 Ct. Cl. 615, 620, 390 F.2d 886, \_\_\_ (1968). One significant limitation to a board's authority to raise issues irrespective of the position of the party, is that the "powers and 'conscience' of equity are beyond [their] authority." Jacobsen Construction Co., ENG BCA No. 1551 (unpub.), 1961 Eng BCA Lexis 116, at \*4 (Dec 13, 1961).

<sup>12</sup>One commentator has maintained "[t]he courts and Boards of Contract Appeals have developed the sovereign act to the point where it is now [as of 1975] possible with substantial certainty to identify those acts which are sovereign in nature and to distinguish them from those which are not." Latham, supra note 9 at 34. This conclusion is subject to challenge in view of the confusion of the decisions subsequent to Latham's article. See infra Section III. Also see R. Nash and J. Cibinic, Federal

Admittedly, this situation may be the result of necessary case-by-case analysis because of the nature of the acts.<sup>13</sup> Nevertheless, the plethora of cases should be capable of being distilled into guidance to aid both counsel and judges in identifying and applying the doctrine. If such distillation is not possible, then perhaps the doctrine is merely a label to be attached, rather than a rule of law to be applied. This author maintains that the latter is the case. This study, concentrating largely upon the decisions<sup>14</sup> of the last 30 years, with significant exceptions, is intended to ascertain what constitutes a protected sovereign act.<sup>15</sup>

#### **B. Approach: Organization and Analytical Framework**

Because any study must proceed from a general understanding of the subject, this one will initially address the nature of the sovereign acts doctrine, its purpose and its effect. In

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Procurement Law, Vol. II, 1102 (3d ed. 1980) where the authors posit "sovereign act cases are characterized by a lack of predictability. In some cases, there appear to be precedents supporting either side of a case." Also see, South Louisiana Grain Services, Inc. v. United States, supra note 10 at 287 n. 6 (Government confusion regarding the two capacities).

<sup>13</sup>The criteria for ascertaining the existence of a sovereign act "are not susceptible to mechanical application." Wah Chang v. United States, 151 Ct. Cl. 41, 51, 282 F.2d 728, 735 (1960). This fact necessitates case-by-case analysis.

<sup>14</sup>The decisions considered are those decisions in which the sovereign acts defense was raised, whether as a primary or subsidiary issue.

<sup>15</sup>This phrase was used by Peter Latham to describe acts by the Government which fall within the scope of the doctrine and for which the Government is not liable for damages because of the doctrine. Latham, The Sovereign Act Doctrine In The Law of Government Contracts: A Critique And Analysis, supra note 9. The term will be used in this manner throughout this paper.

that section, Section II, a general examination of how the defense arises, the policy considerations and purposes to be effectuated by application of the doctrine, and the general effects of the doctrine on the contractor will be conducted. Section III will examine the "elements"<sup>16</sup> of the defense. The issues surrounding whether an act constitutes a sovereign act are largely consistent, irrespective of the nature of the purported sovereign act or of the identity of the agency involved in the dispute. For this reason, the cases in which the defense has been raised will be examined in terms of the elements of the defense. After establishing what types of acts the courts and boards have decided properly constitute sovereign acts, section IV will focus upon the multitude of additional factors that affect application of the doctrine.<sup>17</sup> These factors are such that even if the government is found to be acting in its sovereign capacity, liability may nevertheless attach. Section V will address methods of recovery outside of the contract. While the nature and effect of the doctrine render such recourse limited, this examination is necessary to appreciate the final position in which the contractor is placed.

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<sup>16</sup>Throughout this paper the term "elements" will be used to denote those considerations/criteria that the courts and boards have identified as relevant and in some cases necessary to establish the existence of the defense.

<sup>17</sup>Many, i. not all, of these factors may operate independent of the sovereign acts doctrine. Here, however, the discussion will focus solely upon these factors in the context of the sovereign acts doctrine.

Admittedly, generalizations are difficult and may be misleading, but the final substantive section, VI, will attempt to synthesize all that precedes it and arrive at a current state of the law. This section will apply the analytical framework established by the case law in an effort to set forth a set of sovereign act doctrine guidelines to serve as an aid for those confronted with issue.

### C. Scope

This study is intended to address the sovereign acts doctrine as it relates to the United States Government in its capacity as a contract participant. Thus, the impact of the sovereign acts of foreign governments, whether labeled sovereign acts or acts of state,<sup>18</sup> is, with few exceptions, largely beyond the scope of this paper. The exceptions relate to the issue of proximate cause of the loss incurred by the contractor, where the contract is with a United States' governmental entity and is to be performed abroad.<sup>19</sup> Two other areas that exceed the scope of this paper are the "Government Contractor Defense"<sup>20</sup> and the

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<sup>18</sup>See e.g., G.P. Construction & Development Corp., ASBCA No. 28766, 86-2 BCA para. 18,838 (1986); Ernest A. Cost, ASBCA No. 28811, 86-1 BCA para. 18,599 (1985); Cleanco Co., ASBCA No. 12419 67-1 BCA para. 6,562 (1967).

<sup>19</sup>See for example E.L. David construction Co., Inc., ASBCA Nos. 29225 and 34387, 89-3 BCA para. 22,140 (1989).

<sup>20</sup>Amongst the numerous articles addressing this subject are: The Government Contract Defense And The Impact Of ... (Boyle v. United Technologies Corp.), 70 B.U.L. Rev. 691 (1990); Hiestand, O., The Boyle Rule: What Does It Mean? 26 Pub. Cont. NEWSL. 3 (Fall 1990); The Government Contract Defense, 65 U. Det. L. Rev. 89 (Fall 1987); Ausness, R., Surrogate Immunity: The Government Contract Defense And Products Liability, 47 Ohio St. L.J. 984, 36 Def. L.J. 537 (1986).

concept of estoppel in government procurement.<sup>21</sup>

A final area, which exceeds the scope of this study, is the issue of sovereign immunity. Congress has vested jurisdiction over contractual disputes in the United States Claims Court and in the federal district courts, as well as in the agency boards of contract appeals.<sup>22</sup> By establishing jurisdiction, Congress has effectively waived the sovereign's immunity for such claims.<sup>23</sup> Thus, the sovereign acts doctrine has no effect upon jurisdiction, but is instead a defense which prevents recovery.<sup>24</sup> While the ultimate effect of the sovereign acts doctrine

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<sup>21</sup>While one of the prerequisites for estopping the Government from escaping liability for its acts or statements relied upon by the contractor is the requirement that the Government must be acting in its proprietary, rather than its sovereign capacity, see United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), the considerations are founded in equity and are largely different than those involved in the sovereign acts doctrine.

<sup>22</sup>See for example 28 U.S.C. sec. 1491 (establishing jurisdiction in the Claims Court over claims involving any contract of the United States); 28 U.S.C. sec. 1346 (establishing jurisdiction in the federal district courts for certain contract claims). Similarly, jurisdiction exists in each of the agency boards of contract appeals, 41 U.S.C. 607(d).

<sup>23</sup>See County of Suffolk, New York v. United States, 19 Cl. Ct. 295 (1990) ("by classifying the government's obligation [under a grant] as contractual, Congress must be deemed to have waived sovereign immunity and authorized suit under the Tucker Act in the event EPA failed to fulfill its contractual obligations"). Cf. Commonwealth of Kentucky ex rel Cabinet For Human Resources v. United States, 16 Cl. Ct. 755 (1989) (grant and funding by United States is sovereign act, but within jurisdiction of Tucker Act).

<sup>24</sup>See generally, Horowitz v. United States, 267 U.S. 458 (1925); Jones v. United States, 1 Ct. Cl. 383 (1865). The nature of the doctrine as a defense, as opposed to the broader concept of sovereign immunity, was explained by Chief Judge Jones in Miller v. United States, 135 Ct. Cl. 1, 14, 14 F.Supp. 789, 796 (1956) (dissent), when he noted "The immunity [from

may equate with the effect of sovereign immunity, the two are analytically distinct.<sup>25</sup> While this immunity-defense terminology distinction is not always observed by the courts and boards,<sup>26</sup> it will be observed throughout this paper.

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liability for] a sovereign act, as used in a free country, is not a method conjured up to escape contractual liability to individuals. That could have been easily handled by defendant's refusing permission to be sued. It is invoked when the national interest is at stake." Admittedly, the use of the term immunity of a sovereign act may be confusing if the statement is not considered in context. The entirety of the statement, however, indicates that the doctrine is one which does not prevent jurisdiction, but rather precludes liability where the particular loss was created by the United States acting in the national interest. This conclusion is borne out by Old Dominion Security, ASBCA No. 40062, 91-3 BCA para. 24,173 (1991), at 120,918, where Government alleged that because the action in question was a sovereign act it was "not subject to appeal." The Armed Services Board of Contract Appeals clarified that "[t]he sovereign act defense as set forth in Horowitz v. United States, ..., is simply that the Government, as a contractor, cannot be held liable for its general and public acts as a sovereign." (emphasis added).

<sup>25</sup> See Rowan & Son General Contractors, Inc. v. Dept. of Housing and Urban Development, 611 F.2d 997 (5th Cir. 1980) (in the process of ordering the matter transferred to the United States Court of Claims examined two claims one barred by sovereign immunity and the other subject to the sovereign acts defense). The confusion over the status of the doctrine as a defense or an immunity is best explained by Tony Downs Food Co. v. United States, 209 Ct. Cl. 31, 530 F.2d 367 (1976) where the court noted the effect of the doctrine is to render the Government "contractually immune from liability for [its] sovereign acts." 209 Ct. Cl. at 37.

<sup>26</sup> Perhaps the best example of blurring the distinction is Goodfellow Bros., Inc. AGBCA No. 75-140, 77-1 BCA para. 12,336 (1977) where the board referred to the doctrine as the sovereign act immunity defense. Other examples appear in American International Constructors, Inc., Eng BCA Nos. 3633 and 3667, 77-2 BCA para. 12,606 (1977) (referring to the doctrine as sovereign immunity, while citing classic "defense" cases); Dyer & Dyer, Inc., Eng BCA No. 3429, 74-1 BCA para. 10,636 (1974) (increase in wage scales fell within "sovereign immunity"). Furthermore, there is no indication that the situation is improving. See Inman & Associates, Inc., ASBCA No. 37869, 91-3 BCA para. 24,048, at 120,368 (May 1991), where the board, citing

## II. NATURE, PURPOSES AND EFFECTS OF THE SOVEREIGN ACTS DOCTRINE

The sovereign acts doctrine was established by the United States Court of Claims, during its first sitting in 1865.<sup>27</sup> At that time the court held:

The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.<sup>28</sup>

Since that time, despite hundreds of applications, it has undergone little change.<sup>29</sup> While the doctrine is stated quite simply, a superficial examination of its application would have

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Empire Gas Engineering Co., ASBCA No. 7190, 1962 BCA para. 3323 (1962), stated "since it was an order of the contracting authority that increased appellant's performance costs, the sovereign immunity doctrine does not apply," (emphasis added).

The explanation for this apparent confusion is perhaps explained by the boards' focus upon the effect of the doctrine, which does render the Government immune from liability for its actions in its sovereign capacity. In any event, there is no confusion in the analysis applied, which is clearly that apposite to a defense.

<sup>27</sup>See Deming v. United States, 1 Ct. Cl. 190 (1865); Jones v. United States, 1 Ct. Cl. 383 (1865). Also see Horowitz v. United States, 267 U.S. 458 (1925).

<sup>28</sup>Jones v. United States, supra note 27, 1 Ct. Cl. at 384-85, cited with approval in Horowitz v. United States, supra note 27.

<sup>29</sup>See e.g., Hawaiian Dredging & Construction Co., ASBCA No. 25594, 84-2 BCA para. 17,290 (1984), citing Horowitz, Jones and Deming, all supra note 27. Also see Broadmoor Corp., ASBCA No. 37028, 89-1 BCA para. 21,441 (1988), where the entire discussion regarding the doctrine was composed solely of the conclusion that the promulgation of regulations was clearly a sovereign act, citing Hawaiian Dredging.

one conclude that it has not been consistently applied.<sup>30</sup> Before examining the elements and factors affecting the applicability of the doctrine and the ostensible inconsistencies in its application, it is first necessary to appreciate some of the doctrine's fundamental aspects. Those points are: its nature and how it arises; what public policies and considerations justify its existence; and, the effect of the doctrine on the contractor who is confronted with its application.

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<sup>30</sup>Compare Everett Plywood Corp. v. United States, 227 Ct. Cl. 415 (1981) (termination of one contract for environmental reasons was not sovereign act, but if Congress had passed a law prohibiting all cutting in all forests, court asserted that a different result would have been required) with Hedstrom Lumber Co., Inc. v. United States, 7 Ct. Cl. 16 (1984) (termination of seven contracts within a specified area of a specified national forest for environmental reasons, pursuant to federal statute, did constitute a sovereign act). Also compare Derecktor v. United States, 129 Ct. Cl. 103, 128 F. Supp. 136 (1954), cert. granted, 348 U.S. 926, dismissed per stipulation, 350 U.S. 802, settled, 132 Ct. Cl. 812 (surplus government ship sold to plaintiff, but State Department intervention prevented the transfer of vessel to foreign registry held as sovereign act) with David M. Miller v. United States, 135 Ct. Cl. 1 (1956) (frustration of contract for sale of surplus planes due to intervention of State Department held not to be sovereign act). Finally compare, DWS, Inc., ASBCA No. 33245, 87-3 BCA para. 19,960 (1987) (where agency retains discretion to allocate insufficient funds over a number of contracts, the decisions as to which contracts are funded and how much are not sovereign acts) with Winston Bros. Co. v. United States, 131 Ct. Cl. 245, 130 F. Supp. (1955) (when the agency authorized to allocate funds does so on a nondiscriminatory and reasonable basis, the Government is not liable for the resulting shortfall). Admittedly in each of these cases the earlier case was distinguished on its facts. In some instances the distinction truly was without a difference. This conclusion was apparently recognized by one board when, referring to four prior United States Court of Claims's decisions interpreting the risk allocated under contract clauses associated with the sovereign act of appropriating funds, it asserted that two of the cases were better reasoned and the other two "should be adopted with care and restraint." Gunther and Shirley Co. and E.V. Lane Corp., ENG BCA No. 3691, 78-2 BCA para. 13,454 (1978).

#### A. NATURE OF THE DOCTRINE

The sovereign acts doctrine is a defense<sup>31</sup> to Government liability that arises when the Government, acting in its sovereign capacity, performs a public and general act that interferes with a contractor's performance of a government contract.<sup>32</sup> The doctrine is hinged upon the legal fiction of "dual capacity"<sup>33</sup> and represents a method of risk allocation.<sup>34</sup>

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<sup>31</sup>The clarification regarding its status as a defense is set forth supra at note 24. One board has noted "that the assertion of the sovereign act defense is 'in the nature of a confession of *prima facie* breach, and avoidance by reason of its necessary function as a sovereign'." Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 (1990) (quoting Ottinger v. United States, 116 Ct. Cl. 282, 284 (1950)).

<sup>32</sup>Old Dominion Security, ASBCA No. 40062, 91-3 BCA para. 24,173 (1991).

<sup>33</sup>See Speidel, Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts, 51 Geo. L.J. 516, 518 (1963) (hereinafter Speidel). Also see for example, Wilson v. United States, 11 Ct. Cl. 513 (1875). Also see, Carter Construction Co., ENG BCA Nos. 5495-5497, 90-1 BCA para. 22,521 (1989) (Construction contract with Corps of Engineers, Corps's denial of permit to use requested loading facility was sovereign act); Aden Music Co., ASBCA No. 28225, 87-3 BCA para. 20,113 (1987) (During performance of contract with Navy to manage Navy Band tour, where contractor's profit would be amount remaining after paying costs of the tour, Navy's increase of military per diem rate, which increased contractor's costs and decreased earnings, was sovereign act). There is little question that the concept of dual capacity is still viable. See American Satellite Co. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 525-89C, slip op. at 11 (April 13, 1992) ("The sovereign act defense presumes a dichotomy in the roles with which [the] Government can act, even with respect to a single activity").

<sup>34</sup>See generally Id. Also see Landes Oil Co., ASBCA No. 22101, 78-1 BCA 12,910 (1977), where the court opined, at 62,872, "[a] contractor takes the risk of change in governmental regulations, [a sovereign act,] absent express contractual provision to the contrary."

## 1. THEORY OF DUAL CAPACITY

The concept of dual capacity rests upon the roles of the government as both a sovereign and a participant in commerce. While the former enjoys the freedom necessary to govern effectively, the latter is bound to the same rules that bind private contracting parties.<sup>35</sup> This dual capacity exists not only between different agencies, but also within the same agency, when the latter takes action in its sovereign capacity that interferes with a contractual obligation it has undertaken in its contractual capacity.<sup>36</sup> Irrespective of the identity of the sovereign actor, sovereign immunity has been waived only for the acts of the Government in its contractual capacity. Thus, the immunity remains for acts of the Government in its sovereign capacity. This position finds support in the statutes vesting jurisdiction, and hence waiving sovereign immunity, for claims arising under express and implied in fact contracts.<sup>37</sup> That the

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<sup>35</sup>Deming v. United States, supra note 27 at 384.

<sup>36</sup>See American Satellite Co. v. United States, supra note 33, slip op. at 10 (April 13, 1992) (Government can operate in dual roles even with respect to a single activity). Despite this conclusion, acts of the contracting agency that interfere with performance are subject to greater scrutiny and are less likely to be afforded protection under the doctrine. See infra Section III(C)(2). The trend appears to be that, notwithstanding the dual capacity of an agency, where the contracting agency performs a sovereign act that violates one of the Government's express or implied obligations under the contract, both the courts and the majority of the boards of contract appeals will find the injury compensable. See infra Section IV.

<sup>37</sup>See supra notes 22 and 23 and accompanying text. A talismanic incantation of the sovereign act defense does not relieve the Government of liability where an implied-in-fact contract arises pursuant to the agency's effort to implement a sovereign act. See e.g., Lebanon Chemical Corp. v. United

same agency is the source of both acts appears irrelevant.<sup>38</sup> When the same agency is both the contracting agency and the interfering agency, the dual capacity renders that persona of the agency who is interfering with performance technically a non-contracting party.<sup>39</sup> This aspect of the theory brings into question whether the contracting agency has in fact done anything against which to defend, since theoretically the interference is by a third party, who has no obligations under the contract. In any event, the doctrine constitutes a defense, notwithstanding this, perhaps hypertechnical, anomaly.

## 2. SCENARIOS UNDER WHICH THE DOCTRINE ARISES

As a defense, the doctrine finds application in at least two distinct scenarios. The first, and perhaps the classical and most clear-cut, situation is where the interfering action is that of an agency other than the contracting agency. Where the source of the interfering act is an agency other than the contracting agency the doctrine generally applies.<sup>40</sup> This

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States, 5 Ct. Cl. 812 (1984).

<sup>38</sup>Cf. Speidel, supra note 33 at 518, where the author concludes that the duty of cooperation normally owed by one contracting party to the other is imposed only upon the Government as a contracting party and not upon the Government as a sovereign. The continued validity of this conclusion is subject to question. See infra Section IV (A).

<sup>39</sup>The term "interfering act" is intended to identify the governmental act which hinders, prevents or increases the cost of performance of the contract. The term "contracting agency" identifies the agency that has entered into the contract, while "interfering agency" identifies the source of the interfering act.

<sup>40</sup>The applicability of the doctrine in any situation is

situation is best illustrated by the facts of Broadmoor Corp.<sup>41</sup> In Broadmoor, the Navy entered into a contract for the construction of warehouses. As part of the contract, the contractor was required to treat the soil for termites. While no particular pesticide was specified, the contract required the chemical be registered with the Environmental Protection Agency (EPA). The contractor submitted its bid based upon the use of chlordane. After award of the contract, EPA prohibited the sale of chlordane. The contractor was unable to obtain chlordane and used a different pesticide, incurring \$34,000 in additional expenses. The Board held that the action of the EPA was a sovereign act, for which the Navy was in no way responsible,<sup>42</sup> and denied the appeal.

A second situation in which the defense arises is where the contracting agency and the interfering agency are the same. In this situation the results are generally much more problematic and the application subject to inconsistency. One clear example of application of the doctrine, under such facts, is found in Amino Brothers Co. v. United States.<sup>43</sup> In this case the

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dependent upon the act in question meeting the criteria set forth infra in Section III. Additionally, even if the act qualifies as a sovereign act, the factors discussed infra in Section IV may render the Government liable for damages under the contract.

<sup>41</sup>Supra note 29.

<sup>42</sup>The fact that the contracting agency had no role in the action interfering with performance is significant and will be developed more fully infra in Section III.

<sup>43</sup>178 Ct. Cl. 515, 372 F.2d 505, cert. denied, 389 U.S. 846 (1967).

contract was with the United States Army Corps of Engineers (COE) to construct a flood control levee. In order to perform the necessary work, the contractor built a temporary low-water crossing. After being washed away once by a storm, the contractor reconstructed the crossing. Following a second storm, the COE District Engineer opened the flood gates of a dam because of the high water level behind the dam. This action washed out the crossing a second time. The contractor alleged that the COE had interfered with performance of its contract by opening the flood gates which released the water that washed away the crossing. The court ruled that in releasing the water from the dam the COE acted in its sovereign capacity according to regulations of the agency and fulfilled "its duty to the public to operate the dam as a flood control project to protect the dam and lives of people and their property located downstream."<sup>44</sup> This example is indicative of the tension between the competing responsibilities of the Government. But, as expected, where conflicts exist, the agency's sovereign responsibilities take precedence over its contractual responsibilities.<sup>45</sup>

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<sup>44</sup>Id., 178 Ct. Cl. at 525.

<sup>45</sup>The need for such preeminence is obvious. The need for the individual contractor to bear the weigh of such a decision is, however, subject to much debate. Early in this century the Court of Claims, in upholding a claim where the act was determined not to be a sovereign act, expressed concern over this individual burden when it opined "[w]hile from patriotic motives every citizen, for the mutual good of all others, should be held to such reasonable sacrifice of personal interests as may be necessary for the public welfare, the rule should not be held to impose unjust or unequal burdens..." Houston Construction Co. v. United States, 38 Ct. Cl. 724, 736 (1903). On the whole this paper is not intended to cast judgment upon

These examples are intended to convey the clearest of the situations<sup>46</sup> in which the doctrine is applied. Nevertheless, even the "easy ones" provide a point of reference for examining the purposes and effects of the doctrine.

#### **B. PURPOSES OF THE DOCTRINE**

The purposes to be served by application of the doctrine represent various aspects of the public policy surrounding the Government's unique dual role. The General Accounting Office has summed them up as follows: "first, that the Government cannot contract away its sovereignty or duty to take acts in the interest of the public, and second, that the contractor should not be in a better position [vis-a-vis the effect of a sovereign act] because his contract is with the Government rather than a

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the fairness of such decisions vis-a-vis the burden upon the individual contractor.

<sup>46</sup>The remaining sections of this paper discuss the less clear cases, but even the two examples discussed here have various permutations. As in all other areas of the law, it is in these difficult or close cases where the law has been made. For example, in the first situation the law may effectively view the acts of the interfering agency as those of the contracting agency where the agencies are not "truly independent" or where there is a "significant bond" between the agencies. See e.g., Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 (1990); J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 886 (1968). Besides the inherent difficulties in the second situation, the decisions becomes even more fact-bound when the implied obligations of contracting parties are added into the equation. See e.g., Volentine & Littleton v. United States, 144 Ct. Cl. 723, 169 F. Supp 263 (1959). There the Government opened flood control gates, preventing the contractor from finishing its performance, to permit another contractor to perform its work. The Government's conduct, while not labeled a sovereign act was labeled an "inconsiderate breach" of the implied obligation not to hinder. See infra section IV regarding the Government's implied contractual obligations.

private party."<sup>47</sup>

### 1. FREEDOM OF ACTION IN GOVERNING

The first purpose recognizes the "vital need for the United States to be free to perform all necessary acts of government, through whichever agency or department is empowered to act."<sup>48</sup> Thus, the need for effective government necessitates that it act in the interests of the general welfare, unhampered by concerns over its contractual responsibilities to individual citizens.<sup>49</sup>

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<sup>47</sup>Office of the General Counsel, U.S. General Accounting Office, Government Contract Principles, (3rd ed. 1980). One commentator has asserted, despite the acceptance of these reasons by the courts and boards, that these two purposes, as well as the consideration regarding any burden upon the public treasury, see infra Section II(B)(2), "will not support the sovereign act doctrine." Latham, P., The Sovereign Act Doctrine In The Law Of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 29, 37-41 (1975). Mr. Latham maintains that the entire issue of sovereign acts is merely surplusage and that the issues should be resolved under express or implied contractual obligations. Id. at 40. Empirically this position has merit. In resolving the question of protection under the doctrine, the courts and boards have placed increasing importance upon the existence of a contractual relationship between the contractor and the interfering agency.

<sup>48</sup>Speidel, supra note 33 at 537.

<sup>49</sup>Stack, The Liability of The United States for Breach of Contract, 44 Geo. L.J. 77, 85 (1955). While literally hundreds of sovereign act cases have been decided since publication of this article, the basic policies underlying the doctrine remain unchanged. This rationale is currently reflected in the U.S. Army Procurement Law Pamphlet, where it states "[t]he reason for this rule is that the United States, as a sovereign should not be burdened by claims arising from its performance of general acts for the public good." Procurement Law, HQ Dept of the Army, DAPAM 27-153, para. 1-5, 15 March 1983. There is a practical side to this rule as well in that if the Government was required to base its sovereign decisions upon its contractual responsibilities, the task of ascertaining those responsibilities alone would be overwhelming. If any question exists regarding the magnitude of such an undertaking the mere size of the Government should put it to rest. See Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 391-92, 172 F. Supp. 454, 457

Besides the severe limitations associated with governing in such a manner, the costs involved clearly would be prohibitive. Thus, not only is effective government theoretically furthered by the sovereign acts doctrine, the public treasury is protected from an "intolerable burden."<sup>50</sup> While the first purpose of the doctrine focuses upon the benefit to the United States, the second purpose serves a different end.

## **2. EQUITY BETWEEN GOVERNMENT AND PRIVATE CONTRACTORS**

The second purpose is designed to insure equity amongst all affected by the particular sovereign act. This conclusion is most clearly demonstrated by the role that this purpose has played since the inception of the doctrine. In Jones v. United States, the court stated "[t]hough their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."<sup>51</sup> The equity in this purpose is best seen by applying it to a preceding example. If the warehouse construction contract in Broadmoor Corp.<sup>52</sup> was between private parties, rather than the Navy, the result would have

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(1959) (In addressing the imputation of knowledge between agencies the court commented upon the vastness of the Government and its undertakings).

<sup>50</sup> Speidel, supra note 33 at 539. One aspect of the burden is the simple gathering of such information. If any question exists regarding the magnitude of such an undertaking, the mere size of the Government should put it to rest. See Bateson-Stolte, Inc. v. United States, supra note 49, 145 Ct. Cl. at 391-92.

<sup>51</sup> supra note 27 at 385.

<sup>52</sup> Supra note 29.

been the same, absent some contract provision to the contrary. If the contractor had been allowed to recover in Broadmoor, then he would have received preferential treatment simply because his contract was with the Government.<sup>53</sup>

The continued vitality of this consideration is evident by recent reference to it "as the rationale" for the sovereign acts doctrine.<sup>54</sup> Furthermore, the significance of this purpose to the sovereign acts doctrine is seen in its use as a "practical test" for ascertaining whether the act in question is a sovereign act.<sup>55</sup>

In 1984, in Hedstrom Lumber Co. v. United States,<sup>56</sup> the court reiterated that the equity considerations, of placing the government contractor in the same position as the private contractor, were equally applicable to Government liability when its contracts were interfered with by other Government actions:

Given the large number of contracts the Government enters, its contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act doctrine is that in those circumstances, the Government in its contracting role, like its private counterpart, should not incur liability for

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<sup>53</sup>In O'Neill v. United States, 231 Ct. Cl. 823, 826 (1982), the court provided another aspect to this consideration when it said that liability of the Government for a sovereign act should extend no further than if the Government were a private party affected by that same sovereign act.

<sup>54</sup>Weaver Construction Co., supra note 31 at 119, 182 (quoting Froeming Bros., Inc. v. United States, 108 Ct. Cl. 193 (1947)).

<sup>55</sup>Wah Chang Corp. v. United States, 151 Ct. Cl. 41, 282 F.2d 728 (1961).

<sup>56</sup>Supra note 30.

its act done in the governing role.<sup>57</sup>

In essence, the parties to a Government contract are, as much as practicable, intended to occupy the same positions as parties in any private contract.<sup>58</sup> Thus, the two underlying purposes of the sovereign act doctrine are to insure freedom of the sovereign to govern effectively while attempting to maintain equity between the positions of the contracting parties whether the contract is between strictly private parties or between the Government and a private contractor.

### **C. EFFECTS OF THE SOVEREIGN ACTS DOCTRINE**

In appreciating the effects of a sovereign act, more is involved than simply realizing that the Government, generally, is not liable under the contract for damages resulting from the act. The doctrine also affects the contractor's duty to perform, his duty to perform in accordance with the original contract schedule and the costs associated with reprocurement following termination for default. While these effects may appear to be all pervasive, there are limitations to the scope of the doctrine such that even if the sovereign act initially enjoys protected status, that status may be lost if the

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<sup>57</sup>Id. at 25 (emphasis in original).

<sup>58</sup>While this may be the intended result, it is questionable as to whether contracts with the Government can ever really be on the same footing as contracts between private parties. This conclusion follows from the nature of the contract, which constitutes a classic example of an adhesion contract, with little ability of the parties to change the terms and clauses mandated by statutes, regulations and policies. Any hope for this status changing, aside from political considerations, must lie in the arena of negotiated procurement.

Government's actions direct changed or additional work under the contract.

#### **1. NONLIABILITY FOR DAMAGES RESULTING FROM SOVEREIGN ACTS**

The most drastic and widely appreciated effect of a sovereign act under the doctrine is the absence of Government liability for damages to the contractor resulting from the Government's acts in its sovereign capacity.<sup>59</sup> Application of the general rule is seen cases where the Government lifts price controls subsequent to contract award;<sup>60</sup> where the Government imposes new or changed safety regulations;<sup>61</sup> or where the Government prevents the contractor from performing in accordance with his original plan.<sup>62</sup> The vast majority of decisions

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<sup>59</sup>Jones v. United States, Deming v. United States, and Horowitz v. United States, all *supra* note 27. Also see, of more recent vintage, Inter-Mountain Photogrammetry, Inc., AGBCA No. 90-125-1, 91-2 BCA para. 23,941 (1991). It should be noted that, despite the generality of this statement, the Government may in fact be liable for damages, despite the sovereign act doctrine, if either it has impliedly or expressly agreed to compensate the contractor for the damage precipitated by the sovereign act. See e.g., Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527 (1948).

<sup>60</sup>See, e.g. Martin K. Eby Construction Co., IBCA No.1389-9-80, 81-1 BCA para. 15,052 (1981) (lifting of price controls imposed under Emergency Petroleum Act of 1973 held to be sovereign act).

<sup>61</sup>See, e.g., Radiation Facilities, Inc., AGBCA No. 265, 71-1 BCA para. 8638 (1971) (change in Department of Transportation regulations, after submission of bid on contract with Department of Agriculture, regarding transport of radioactive material was sovereign act).

<sup>62</sup>See, e.g., Warner Electric, Inc., VABC No. 2106, 85-2 BCA para. 18,131 (1985). There, the Environmental Protection Agency promulgated regulations prohibiting export of PCB containing material, which prevented contractor from selling and exporting old transformers. Because the proceeds from that planned sale were calculated into the contractor's bid price, the contractor

surrounding the sovereign acts doctrine involve the nonliability for damages.<sup>63</sup> While the general rule of nonliability is the most frequent litigated aspect of the effects of the doctrine, it is not the sole affect upon the relationship between the Government and its contractor.

## 2. EXCUSAL OF NONPERFORMANCE

Another area affected by a sovereign act involves non-performance. "[W]here [sovereign] acts render the performance actually or practically impossible" the contractor's non-performance is excused.<sup>64</sup> An example of such a situation occurred in United States v. Peck.<sup>65</sup> In Peck the only source for fulfilling the contract was removed when the Government awarded a second contract to cut the same hay. The Court held such an act by the Government excused Peck's nonperformance. In such cases, even absent the sovereign acts doctrine, as long as the cause rendering performance impossible is not the contractor, he is excused from performing.<sup>66</sup>

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suffered a loss on the contract. The Board held that the promulgation of the regulation was a sovereign act and the appeal was denied.

<sup>63</sup>See infra Section III(C)1)(a) for cases involving this effect.

<sup>64</sup>K-P Hydraulics Co., GSBCA No. 4813, 79-1 BCA para. 13,568 (1978). Accord, National U.S. Radiator Corp., ASBCA No. 3972, 59-2 BCA para. 2386 (1959). Also see, FAR 49.504 and the associated termination clauses at 52.249-8 (default in fixed-price supply and service contracts) and 52.249-10(b) (default in fixed-price construction contracts).

<sup>65</sup>102 U.S. 46 (1880).

<sup>66</sup>This excuse for nonperformance operates independent of the

Such an excusal, however, does not run to performance which is merely more expensive,<sup>67</sup> as demonstrated by Wear Ever Shower Curtain Corp.<sup>68</sup> In Wear Ever, the contractor was terminated for default following his refusal to perform because the lifting of price controls substantially increased his cost of performance. The board held that the lifting of price controls, after contract award, was a sovereign act<sup>69</sup> and did not excuse performance that was simply rendered more expensive; thus, default termination was proper.<sup>70</sup> The burden of proving this excusal rests with the contractor.<sup>71</sup> Thus, if the contractor,

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sovereign acts doctrine. See Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (providing test for impracticality). Nevertheless, it clearly applies to performance rendered impossible by a sovereign act. See National U.S. Radiator, supra note 64.

<sup>67</sup>K-P Hydraulics Co., supra note 64; Read Plastics, Inc., GSBCA No. 4159-R, 77-2 BCA para. 12,609 (1972).

<sup>68</sup>GSBCA No. 4360, 76-1 BCA para. 11,636 (1975).

<sup>69</sup>Also see infra Section III for additional cases where the cost of performing was increased as the result of a sovereign act which did not excuse performance.

<sup>70</sup>If the cost of performance is increased by too great a factor at least one board has held that termination for default is improper. Ned C. Hardy, AGBCA No. 74-111, 77-2 BCA para. 12,848 at 62,541 (1977). In that case, under facts analogous to those of Wear Ever, the Board opined that the sovereign acts doctrine placed the contractor in a "Catch 22" in which the contractor loses if he performs and loses if he does not perform. This case appears to be an aberration, in that this result is the quintessence of the doctrine which effects a method of risk allocation. See supra Section II(C)(1). Perhaps these cases can be reconciled by the fact that in Ned C. Hardy the change in conditions was contrary to a long-standing policy, while in the latter such was not the case. Wear Ever clearly represents the normal resolution of such situations. See cases cited infra in Section III(C)(1)(a)(iii).

<sup>71</sup>Cf. Oakland Industries, Inc., ASBCA No. 5755-5757, 60-2

seeks only to avoid a default termination, he must prove the act which caused the delay was a sovereign act and that it precipitated the delay.<sup>72</sup>

A final consideration relevant here is that sovereign acts will not excuse nonperformance where the sovereign act is precipitated by the fault or negligence of the contractor. This situation invariably arises where the contractor has failed to fulfill an obligation owed to the Government, be it under the contract or independent of its contractual responsibilities. The failure to comply with contractual obligations arose in California Meat Co.<sup>73</sup> In that case the Government withdrew meat inspection services from the contractor's plant, pursuant to statute and 7 C.F.R. 53.13, which rendered the contractor unable to perform. In sustaining the default termination portion of the appeal, the Board found that the sovereign act was precipitated by the contractor's employee's altering production dates and lot numbers on 100 boxes of previously rejected ground beef. The Board held "that the sovereign act of withdrawing inspection and grading services for valid regulatory program reasons did not constitute an excusable cause for

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BCA para. 2,805 (1960) (contractor has burden of proving the excusability of its default).

<sup>72</sup>This requirement places the contractor and Government in the same position vis-a-vis the issue of proving the sovereign act. See Weaver Construction Co., supra note 31 at 119,183 where the board stated "reliance upon [prior] decisions is not a substitute for producing evidence which demonstrates that the fire closure order in this case were protected sovereign acts." (emphasis in original).

<sup>73</sup>AGBCA No. 76-152, 80-2 BCA para. 14,607 (1980).

failure to perform...<sup>74</sup>

The second situation where a sovereign act will not excuse the failure to perform arises from a contractor's failure to meet his obligations under the tax laws. Thus, a contractor's failure to perform because its plant and equipment were seized and locked by the Internal Revenue Service<sup>75</sup> or because the Government placed a tax levy against all future government contracts<sup>76</sup> will not excuse nonperformance.

### 3. EXCUSAL OF PERFORMANCE DELAYS

In a similar vein, a delay resulting from a sovereign act constitutes an excusable delay, for which an extension of time is permitted, where the contractor is not at fault.<sup>77</sup> A classic manifestation of this effect is found in the "fire closure"

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<sup>74</sup>Id. at 72,055.

<sup>75</sup>National Cleaners & Laundry, Inc., ASBCA 16186, 74-2 BCA para. 10,978 (1974) reconsid. denied, 75-1 BCA para. 11,035 (1975).

<sup>76</sup>Ultimate Janitorial Services, Inc., GSBCA No. 6905, 84-1 BCA para. 17,136 (1984). Also see Sig-Trans, Inc., ASBCA No. 10557, 66-1 BCA para. 5,422 (1966) (enforcement of tax lien was sovereign act, but did not excuse nonperformance).

<sup>77</sup>Lloyd H. Kessler, Inc., AGBCA No. 88-170-3, 91-2 BCA para. 23,802 (1991); Marine Transport Lines, Inc., ASBCA No. 28962, 86-3 BCA para. 19,164 (1986); D.D. Montague, ASBCA No. 11837, 67-1 BCA para. 6,217 (1967); Gibson Manufacturing Corp., ASBCA Nos. 1555, 1556, 1955 ASBCA Lexis 1036 (1955); See also, FAR 49.505(d) and the associated clause at 52.249-14. Even in these situations, whether the contractor will be entitled to compensation, in addition to the temporal extension, is dependent upon the language of the contract (see, infra Section IV) and the facts surrounding the delay. While the forgoing may be the general rule, the boards do not apply it to those situations where the sovereign act merely renders performance more expensive. Air-Speed, Inc., PSBCA 96, 75-1 BCA para. 11,113 (1975); Hydro-Space Systems Corp., ASBCA 15275, 71-1 BCA para. 8,739 (1971).

cases where the Government closes a national forest, thereby denying the contractor access to the job site in a national forest, because of the high risk of forest fires. The denial of such access has repeatedly been held to constitute a sovereign act<sup>78</sup> "which is not compensable except for additional contract time."<sup>79</sup> Resolving this issue will invariably involve questions of proximate cause of the delay.<sup>80</sup>

#### **4. INCREASE IN REPROCUREMENT COSTS FOLLOWING SOVEREIGN ACT**

In the event of a default termination and subsequent reprocurement, the terminated contractor is responsible for all costs. Thus, when a sovereign act increases the expenses of reprocurement,<sup>81</sup> or lowers the bid in a timber sale contract, the contractor's liability is affected by the sovereign act.<sup>82</sup>

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<sup>78</sup>Lloyd H. Kessler, Inc., supra note 77; Goodfellow Brothers, Inc., AGBCA No. 75-140, 77-1 BCA para. 12,336 (1977); L.S. Matusek, ENGBCA No. 3080, 72-2 BCA para. 9,625 (1972). This consistency is subject to question where the contracting agency or another agency with whom the contracting agency has a significant bond initiates the closing. See Weaver Construction Co., supra note 31 (denying Government motion for judgment on the pleadings). Also see, infra Section III(C).

<sup>79</sup>Lloyd H. Kessler, Inc., supra note 77 at 119,191.

<sup>80</sup>In any type of claim, even one for additional time to avoid default termination, the contractor bears the burden of establishing fault, causation and resultant injury. Cf., Pacific Architects & Engineers, Inc., ASBCA 21168, 79-2 BCA para. 14,019, reconsid. denied, 79-2 BCA 14,174 (1979) (to recover under clause providing relief for sovereign act contractor must show the act caused the injury); Also see, Electronic & Missile Facilities, Inc. v. United States, 189 Ct. Cl. 237, 416 F.2d 1345 (1969).

<sup>81</sup>See e.g., Golden Gate Building Maintenance Co., ASBCA No. 12202, 68-1 BCA 6,739 (1967) (increase in wages as result of statute resulted in increased cost of reprocurement).

<sup>82</sup>Moore Mill & Lumber Co., AGBCA No. 87-172-1, 90-3 BCA

The clearest example of such an effect is seen in the timber sale cases. In both Moore Mill & Lumber Co. and Conifer Logging Co. the purchasers failed to remove the timber in the time required under the contract. In the interim, the National Forest Service, pursuant to statute, implemented a requirement for a 10% cash down payment and a midpoint payment on the timber. The effect of such requirements was to make the sale less attractive and affected the number and amounts of the bids received on resale. The board agreed that the new requirements affected the resale bids, but held that the regulations were the product of a sovereign act, were normal contract risks, and that the original purchaser was liable for the full costs of reprocurement.<sup>83</sup>

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para. 23,111 (1990); Conifer Logging Co., AGBCA 87-310-1, 90-1 BCA para. 22,232 (1989).

<sup>83</sup>A final, and perhaps anomalous, effect of a sovereign act proffered by the Corps of Engineers Board of Contract Appeals, in Carter Construction Co., ENG BCA Nos. 5495-5497, 90-1 BCA para. 22,521 (1989), is that "actions of the Government in its regulatory or sovereign capacity are not reviewable as such." This view was subsequently echoed by the Department of Agriculture Board of Contract Appeals in Inter-Mountain Photogrammetry, Inc., AGBCA No. 90-125-1, 91-2 BCA para. 23,941 (1991), and again in Pacific Northern Timber Co., AGBCA No. 77-172-5, 91-1 BCA para. 23,309 (1990); in both instances citing Carter Construction Co. It does not appear that either board intends to convey the idea that acts by the Government are not subject to review. Instead, the intent of the language seems to be that the boards will not review the actions of the Government in terms of whether the act should have been taken or the wisdom of such acts. See, Ottinger v. United States, 123 Ct. Cl. 23, 48 (1952) where the court stated "[w]e of course express opinion of the wisdom of the policy [of not referring labor to firms engaged in labor disputes] in general or in wartime conditions when labor is scarce and the timely completion of jobs is urgent." Clearly, the Corps of Engineers Board of Contract Appeals has not hesitated to find a purported sovereign act to be in fact an act of the Government in its contractual capacity.

## 5. LIMITATION ON PROTECTION FROM EFFECTS OF SOVEREIGN ACT

While the above examples represent the most widely observed effects of the sovereign acts doctrine, there is a limit to the protection. If the effects from a sovereign act constitute additional or changed performance under an agreement, the sovereign acts doctrine will not shield the Government from liability. An example of this limitation is found in Nero and Associates.<sup>84</sup>

In that case the contract was for operations and maintenance services, including fire protection, at Air Force Plant 42, Palmdale, California. The installation commander was informed that members of the contractor's work force had used or possessed controlled substances on the installation and had consumed alcohol while on duty as firemen. Pursuant to Air Force regulations and under the authority of the Internal Security Act of 1950, the commander barred 30 of the contractor's employees from entry onto the installation.<sup>85</sup> The commander required the contractor to enforce the barment and required the contractor to submit a plan showing how the contractor planned to maintain the required level of services

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See Walden Landscape Co., ENG BCA No. 3534, 75-2 BCA para. 11,538 (1975) (the purported sovereign act was held to be a contractual act and further that the acts of the Government were "unreasonable and arbitrary").

<sup>84</sup>ASBCA No. 30369, 86-1 BCA para. 18,579 (1985).

<sup>85</sup>While the board found that under the particular facts of this case the barment action of the commander was not a sovereign act, it opined that such barments would constitute a sovereign act if the regulations had been complied with.

during the period in which the contractor sought replacements for the barred workers. In denying the Government's motion for summary judgment the board stated:

As was made clear by the Board in Empire Gas, [ASBCA No. 7190, 1962 BCA para. 3323] an act taken in furtherance of public and general needs can cease to be a sovereign act when it takes the form of a direction for implementation under the contract. To the extent that said direction requires additional or changed contract performance, it is deemed an act taken in the government's contractual capacity and resulting increased costs and performance time resulting therefrom are, accordingly, compensable.<sup>86</sup>

Thus, even if the original order was a sovereign act, the requirements that exceeded the scope of that act, notwithstanding the concerns that motivated those requirements, were not entitled to protection under the doctrine. In short, it appears that the protection afforded a sovereign act extends only so far as is minimally necessary to effectuate the act irrespective of its impact on the Government's needs under the contract.<sup>87</sup>

Thus, a multitude of effects, beyond the most obvious and well known effect of freedom from contractual damages, result from an act of the Government in its sovereign capacity. Before

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<sup>86</sup>Id. at 93,297.

<sup>87</sup>Cf., Lebanon Chemical Corp. v. United States, *supra* note 37, where the court, in addressing an implied-in-fact contract in furtherance of a sovereign act, stated, at page 817, that "violations of such agreements are not exempt from remedy merely because the agreements also facilitate a larger scheme of action by the sovereign." The analysis should be the same whether an express agreement exists or not. In both cases what initially was, or under the regulations should have been, a sovereign act was converted into a contractual act by the Government's decision, in its contractual capacity, to require affirmative performance by the contractor pursuant to an agreement.

any of the aforementioned effects will affect the contractor, however, the act in question must constitute a sovereign act within the meaning of the doctrine. In order for the government action to qualify for such protection, the tribunal must first conclude that the elements of the sovereign act doctrine are met.

### **III. ELEMENTS OF THE DOCTRINE**

#### **A. DEVELOPMENT AND COVERAGE OF ELEMENTS**

One could logically presume that the elements of a doctrine over a century old would be, by this time, clearly established. In the case of the sovereign acts doctrine this presumption is ostensibly both true and false. The truth of the presumption lies in the fact that the general considerations and areas of examination are largely the same as originally set forth in 1865. At that time, the doctrine protected Executive and Legislative actions of the Government that were "general and public."<sup>88</sup> This protection, was subsequently interpreted to protect all government acts of a public and general nature.<sup>89</sup>

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<sup>88</sup>Initially, this protected conduct was that of the legislative branch, Deming v. United States, 1 Ct. Cl. 190 (1865). Later that same year, however, the protection was extended to cover the acts of the executive. Jones v. United States, 1 Ct. Cl. 383 (1865). The result was that conduct of either the legislative or executive branches that was "general and public" came under the protection of the doctrine.

<sup>89</sup>See e.g., Broadmoor Corp., ASBCA No. 37028, 89-1 BCA para. 21,441 (1988) (action of federal district court banning use of chlordane, which increased cost of performance, fell within sovereign act protection). Also see, Reynolds Metals Co. v. United States, 194 Ct. Cl. 309, 438 F.2d 983, cert. denied, 404 U.S. 825 (1971) (act of GSA could not bind the courts or Congress).

Thus, the protection extended to any act of Government in its sovereign capacity that had a "general and public" effect.

### 1. ARTICULATIONS OF THE ELEMENTS

The falsity of the presumption, if any, lies in the articulation of the elements necessary to establish the availability of the defense. The elements have been variably stated to be the following:

[T]o come within the rule of immunity for a sovereign act, the action taken must be (1) in the public interest, (2) must have general rather than a specific or local application, and (3) if it goes too far it will be recognized as a taking;<sup>90</sup> or,

The courts have usually found the acts of Government agents to be made in a sovereign capacity where they: (1) are public and general, not directed to the contractor; (2) would equally affect dealings of private parties; (3) are in the public interest; and, (4) have an indirect affect on the contract;<sup>91</sup> or,

Three conditions must be met for a governmental act to be protected by the sovereign acts doctrine: (1) the act must be public in nature and general in application, (2) the contracting agency must not be the motivating force behind the conduct that impairs contract performance; and, (3) Congress must not have expressly waived sovereign immunity over the contracting agency's conduct;<sup>92</sup> or

The test for determining whether a Governmental action is a sovereign act is whether the action was taken in the national interest and had a "public and general"

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<sup>90</sup>Air Terminal Services, Inc. v. United States, 165 Ct. Cl. 525, 538, 330 F.2d 974, cert. denied, 379 U.S. 829 (1964) (Jones, C.J., dissenting).

<sup>91</sup>Office of the General Counsel, U.S. General Accounting Office, Government Contract Principles, pp. 1-8 and 1-9 (3rd ed. 1980).

<sup>92</sup>Port Arthur Towing Co. v. Department of Defense, et al., F. Supp. \_\_\_, 1991 U.S. Dist. Lexis 9456, granting Defendant's cross-motion for summary judgment, (D.D.C. 1991) (citations omitted).

application.<sup>93</sup>

## 2. CENTRALITY OF PUBLIC AND GENERAL APPLICATION

Even a cursory examination of the above formulations indicates that a central requirement for applying the doctrine is that the act is "public and general" in nature and effect. Even this basic requirement, however, has not been unquestioned. In Empire Gas Engineering Co.,<sup>94</sup> the Board opined:

The basic principle of the sovereign act immunity doctrine is that the contractor not benefit from the fact that his contract is with the Government .... In the Horowitz case the significant factor about the freight embargo was not so much that it was "public and general," or that it was insulated from the contracting agency by having been issued by an independent Government agency, or that it was necessary or even incidental to the performance of any governmental function, but that it was the type of Government act that would have affected a contract between private parties in the same way that it affected the contract with the Government.<sup>95</sup>

The decision in Empire Gas was subsequently interpreted by the same Board as deciding that:

[T]he crucial criterion to be applied in determining whether an act was sovereign or contractual in character was whether "it was a type of Government act that would have affected a contract between two private parties in the same way that it affected the

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<sup>93</sup>Hedstrom Lumber, 7 Cl. Ct. 16, 25 (1984) (citing Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 196, 351 F.2d 956, 967 (1965)).

<sup>94</sup>ASBCA No. 7190, 1962 BCA para 3,323 (1962).

<sup>95</sup>Id. at 17,127-28. The curious part about this statement is that, the year before this Board decision, the Court of Claims had proffered the universal impact of the act as a test for whether the act in question was "public and general." Wah Chang Corp. v. United States, 151 Ct. Cl. 41, 282 F.2d 728 (1961).

contract with the Government."<sup>96</sup>

Notwithstanding the language of Empire Gas, the "public and general" nature of the governmental act appears to remain a major, if not the primary, criterion against which applicability of the doctrine is measured,<sup>97</sup> even by the board that decided Empire Gas.<sup>98</sup> This statement, however, should not be taken to mean that simply because the act is public and general it will

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<sup>96</sup>Nero & Assoc., ASBCA NO. 30369, 86-1 BCA para. 18,579, at 93,297 (1985) (emphasis added). The distinction between the import of this language and the concept of "public and general" application may be more form than substance. This conclusion arises from the fact that arguably any public and general act by the Government would equally affect a contract between private parties. Support for this conclusion can be inferred from Hedstrom Lumber, supra note 93 at 25 where the elements of the doctrine asserted by the court did not contain the Armed Services Board of Contract Appeals's "crucial criterion."

<sup>97</sup>Everett Plywood Corp. v. United States, 227 Ct. Cl. 415, 651 F.2d 723 (1981) (unilateral cancelling of contract was "neither public nor general"); Adams Manufacturing Co., GSBCA No. 5747, 82-1 BCA 15,740 (1982) (moratorium on office purchases was not public and general in view of numerous exceptions); Hedstrom Lumber Co., Inc. v. United States, supra note 93 (act of Congress affecting all contractors performing in particular part of specific national forest was public and general thus a sovereign act); Bared International Co., ASBCA No. 30048, 88-1 BCA para. 20,378 (1987) (Navy's act of increasing messing costs was applicable world-wide and as such had a public and general effect); R & R Enterprises, IBCA No. 2417, 89-2 BCA para. 21,708 (1989) (construction project affecting a single contractor lacked breadth to constitute a public and general act); Lloyd H. Kessler, Inc., AGBCA No. 88-170-3, 91-2 BCA para. 23,802 (1991) (fire closure applicable to all contractors, thus a public and general act).

<sup>98</sup>See Philco-Ford Corp., ASBCA No. 14623, 72-1 BCA para. 9390 (1972) (insertion of Labor Standard clause by contracting officer establishing wage rate not a "public and general" act); The Franchi Construction Co., ASBCA No. 16735, 74-2 BCA para. 10,654 (1974) (local ban on burning, to assuage residents, not a public and general act); Federal Electric Corp., ASBCA No. 20490, 76-2 BCA para. 12,035 (1976) (denial of access to work site was not public and general act).

qualify for protection under the doctrine.<sup>99</sup>

### **3. ELEMENTS ACCORDED VARYING WEIGHTS**

While the public and general nature of a governmental act may be a central focus in ascertaining the existence of the doctrine, the courts and boards<sup>100</sup> tend to place differing emphasis upon different elements, depending upon the facts

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<sup>99</sup> There are, however, cases that only expressly consider whether the act was public and general in deciding whether it was a sovereign act. Such a limited approach cannot be taken to mean that this was the only consideration, but rather that this element was the only element under dispute. See, e.g., Wah Chang Corp., 151 Ct. Cl. 41, 282 F.2d 728 (1961) (citing Jones v. United States, 1 Ct. Cl. 383, 384-85) (act taken to protect the secrecy of troop movements during World War II). Furthermore, the simple expression that the act in question was a public and general act should impliedly contain the other elements. Such imprecise language, however, makes for difficult analysis.

<sup>100</sup>The Comptroller General (CompGen) has had occasion to decide entitlements based upon the sovereign acts doctrine. The relief invariably sought by the contractor or bidder was revision or amendment of the contract. The factual circumstances giving rise to the request of the CompGen were analogous to those surrounding the appeals to the courts and boards. Those decisions, however, are very few and little analysis of the doctrine was employed in reaching the consistent conclusion that the sovereign acts doctrine barred the relief sought. Therefore, the CompGen decisions will not be addressed individually, but are referenced here merely for the sake of completeness. See for example, R.H. Pines Corp., 54 Comp. Gen. 527, 74-2 CPD para. 385 (1974) (Contractor sought cancellation of contract because devaluation of dollar and embargo rendered performance of fixed price contract more expensive); Comptroller General Decision B-28638, 22 Comp. Gen. 260 (1942) (Government's imposition of gasoline rationing was sovereign act); Comptroller Decision B-15941, 20 Comp. Gen. 703 (1941) (Successful bidder not relieved of contract where price controls implemented by Government was sovereign act); Comptroller General Decision A-43944, 12 Comp. Gen. 278 (1932) (Imposition of federal gasoline tax was sovereign act for which contractor was responsible and therefore amendment of contract not appropriate); Comptroller General Decision, A-23641, 8 Comp. Gen. 25 (1928) (Act of Congress increasing workmen's compensation contribution by contractor was sovereign act and not basis for amendment of contract).

presented, to ascertain whether the governmental act is entitled to protection.<sup>101</sup> Furthermore, depending upon the facts, the particular elements may overlap, blurring convenient distinctions.<sup>102</sup> Additionally, simply because other boards have held similar acts to be sovereign acts "is not a substitute for producing evidence which demonstrates that the [acts in question] in [a particular] case were protected sovereign acts."<sup>103</sup>

Since talismanic incantations<sup>104</sup> and precedent from other boards will not suffice to establish which acts are "protected sovereign acts," an understanding of the elements is necessary. While given differing weights of consideration, the case law, either expressly or impliedly, reflects examination of certain

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<sup>101</sup> Compare, e.g., Empire Gas Engineering Co, supra note 94 (criteria considered are whether parties to a private contract suffer same effect and the source of the interfering act) with DWS, Inc., ASBCA No. 33245, 87-3 BCA 19,960 (1987) (criteria considered are whether the action was taken in the national interest, had a public and general application, and the amount of discretion vested in the contracting agency).

<sup>102</sup>For example, the elements of "public" and general application" and "an act in the public interest" lend themselves to confusion. Throughout this paper, the former is intended to address the scope of the act's application, while the latter relates to the purpose to be served by the act. This blurring of the elements may explain the apparent contradiction in the articulation of the elements between Hedstrom Lumber and Empire Gas. See supra notes 93 and 94 and accompanying text.

<sup>103</sup>Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 at 119,183 (1990) (emphasis in original).

<sup>104</sup>American Satellite Co. v. United States, 20 Cl. Ct. 710, 715 (1990). Also see John M. Bragg, ASBCA No. 9515, 65-2 BCA para. 5050 (1965) (Board could not find the action done in sovereign capacity on "ailegation alone").

elements<sup>105</sup> that can be distilled and will be used as the framework of this section. Those analytical elements are: (1) the act was public in nature and had general application;<sup>106</sup> (2) the identity of the interfering actor; and, (3) the act was performed in the national interest.<sup>107</sup>

#### **B. PUBLIC AND GENERAL APPLICATION**

As the term indicates, this "element" of the doctrine requires the purported protected sovereign act be a public act of the Government with application to the general public. Moreover, only public and general acts of the Government in its

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<sup>105</sup>Admittedly these considerations are not truly elements because the presence of every one is not required before the doctrine will be found extant. Instead, they more closely resemble considerations of varying importance depending upon other factors present in the situation. For ease of reference, however, these considerations will be labeled elements to distinguish them from the factors, discussed infra in Section IV, which may render the Government liable for the effects of a sovereign act despite these existence of the elements that would otherwise render the act a protected sovereign act.

<sup>106</sup>A necessary facet of this element is that the act was not directed at either the contractor or the contract. Because the presence of action directed at either the contractor or contract should, by definition, not qualify as an act of public and general application, this facet of the doctrine will be examined under the public and general application section.

<sup>107</sup>This element has been referred to by various terms. It has been expressed, for example, as an act for the "general good and common welfare," Hawaiian Dredging & Construction Co., ASBCA No. 25594, 84-2 BCA para. 17,290 at 86,109 (1984); as an act in the "national interest," Hedstrom Lumber, 7 Ct. Cl. 16 (1984); DWS, Inc., ASBCA No. 33245, 87-3 BCA para. 19,960 (1987); or as an act "for the general good." Tony Downs Food Co. v. United States, 209 Ct. Cl. 31, 530 F.2d 367 (1967). Irrespective of the words chosen, the import of the element is that the purpose to be served by the act must transcend the immediate needs of the agency promulgating the act. See, Franchi Construction Co., ASBCA No. 16735, 74-2 BCA para. 10,654 (1974).

sovereign capacity<sup>108</sup> will be afforded the protection available under the doctrine. The significance of this distinction cannot be overemphasized. As the Court of Claims stated in 1950:

[T]o treat every act of a Government agent, done in the name of the Government, as an act of sovereignty within the meaning of the [sovereign acts] doctrine would be a retreat, without reason, from the purpose of the statute permitting citizens to sue the United States for breach of contract.<sup>109</sup>

While this language would indicate that it is the nature of the act that should be the focus of inquiry in determining the capacity in which the Government is acting, the cases tend to decide the nature of the act through an examination of the scope of the act.

The case law indicates that it is the effective scope,

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<sup>108</sup>The difficulty in ascertaining whether the government is acting in its sovereign capacity or its contractual capacity is not unique to government contracts. The United States Supreme Court has repeatedly sought, without great success, to distinguish between the government's acts in its public versus its private capacity. New York v. United States, 326 U.S. 572, 580-81 (1946); Indian Towing Co. v. United States, 350 U.S. 61, 65-68 (1955). Also see City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 433-34 (1978) (Stewart, J. dissenting). In the first two cases the distinction was labeled a "quagmire." See Yosemite Park & Curry Co. v. United States, 231 Ct. Cl. 393, 686 F.2d 925 (1982). While the Court of Claims maintained in Yosemite Park that the distinction was valid for that case, it noted that the distinction "will not yield a clear line in all situations." Id. 231 Ct. Cl. at 407 n. 40. In ascertaining whether the government was acting in its sovereign capacity vis-a-vis application of the sovereign acts doctrine, the courts and boards tend to equate the existence of the doctrinal elements with an act of the Government in its sovereign capacity. This equation, while generally accurate, may confuse the issue when "the government contract[s] with one of its citizens to do a very common and ordinary thing not in any way related to or involving its existence." R&R Enterprises, IBCA No. 2417, 89-2 BCA para. 21,708 (1989) (quoting United States v. Oklahoma Gas & Electric Co., 297 F. 575 (1924)).

<sup>109</sup>Ottinger v. United States, 116 Ct. Cl. 282 (1950).

rather than the absolute scope, of the act that constitutes the deciding factor in ascertaining whether the act in question is public and general. This analysis does not require that others actually be effected; only that the act apply to all who are situated similarly to the affected contractor and thus is not directed at either the contractor or the particular contract.<sup>110</sup> This conclusion is borne out by comparing the results in Everett Plywood Corp. v. United States<sup>111</sup> with those in Hedstrom Lumber Co. v. United States.<sup>112</sup>

In Everett Plywood the court stated that an act of Congress prohibiting "all cutting in all forests" would constitute a public and general act of the sovereign. Yet, three years later, in Hedstrom Lumber, the same court held an act of Congress prohibiting the cutting of timber in a particular portion of a particular national forest, thereby terminating seven contracts, qualified as a public and general act.<sup>113</sup> In that case the court opined that "national application of a Government policy cannot be seen as a sine qua non of a sovereign

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<sup>110</sup>See for example, Bobby R. Lang and Robert R. Lang, ASBCA No. 28552, 86-2 BCA para. 18,836 (1986) (enforcement of Military Post System Regulations applied to all concessioners, even though only appellant's cost of doing business was directly impacted by the regulation). Also see, Hedstrom Lumber, supra note 93. Cf., Hughes Communications Galaxy, Inc. v. United States, No. 91-1032C, slip op. at 27 (April 13, 1992) ("The determinative question on this issue is not whether the plaintiff was the only one effected, but whether the plaintiff was the only one targeted").

<sup>111</sup>Supra note 97.

<sup>112</sup>Supra note 93.

<sup>113</sup>Hedstrom Lumber Co., Inc., supra note 93.

act."<sup>114</sup> In Hedstrom Lumber, the court focussed upon the fact that the act affected everyone who sought to use the designated portion of the forest for whatever purpose. While this latter case represents, perhaps, the most limited scope of such analysis, it is not the first such application.

In Clemmer Construction Co. v. United States,<sup>115</sup> the court addressed the general and public application of an Executive Order fixing the work week at 48 hours, but applicable only to expressly designated areas of the country. The contractor maintained that since the act was not directed at all areas of the country, it was not public and general but was instead directed at specific contractors.<sup>116</sup> The Board noted that the order was applicable to 150 areas throughout the nation and "suppose[d] that so many areas ... include[d] all of the areas of industrial importance in the country."<sup>117</sup> Thus, the "limited" application arguably was national application. In any event, the court found that the act clearly was not directed at the contractor,<sup>118</sup> and therefore qualified as a public and

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<sup>114</sup>Id.

<sup>115</sup>108 Ct. Cl. 718, 71 F. Supp. 917 (1947).

<sup>116</sup>Cf., Philco-Ford Corp., ASBCA No. 14623, 72-1 BCA 9,390 (1972) where the Board held that wage increases required in government contracts were not public and general acts but instead were directed only at United States-invited contractors under a "United States Public Contract Award" and thus were directed at the contractor.

<sup>117</sup>Id., 108 Ct. Cl. at 720.

<sup>118</sup>Compare, Philco-Ford, supra note 116. A distinction between these two cases lies in the fact that the Executive Order in Clemmer was promulgated by the President, while the

general act.<sup>119</sup>

Two indicia of "public and general" acts are that they are neither local and specific in application nor directed at either a particular contract or contractor.<sup>120</sup> As should be expected,<sup>121</sup> the vast majority of acts which are found to be

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wage rate clause of the contract in Philco-Ford was inserted into the contract solely at the discretion of the contracting officer.

<sup>119</sup>See for example, Lloyd H. Kessler, Inc. AGBCA No. 88-170-3, 91-2 BCA para. 23802 (1991) (Fire closure order); (Carter Construction Co., ENG BCA 5495, 90-1 BCA para. 22,521 (1989) (issuance of permit for particular loading dock refused pursuant to agency regulations); Harrison, ASBCA No. 11678, 67-2 BCA para. 6,421 (1967) (intergovernmental agreement made with this specific contract in mind was not a sovereign act); South Louisiana Grain Services, Inc. v. United States, 1 Ct. Ct. 281 (1982) (actions of Federal Grain Inspection Service directed at contractor, not a sovereign act); Anthony P. Miller, Inc. v. United States, 161 Ct. Cl. 455 (1963) (increase in FHA mortgage rates not directed at contractor); Alger-Rau, Inc. v. United States, 109 Ct. Cl. 846 (1948) (extension of work week to 48 hours).

<sup>120</sup>See for example, Chemical Commodities, Inc., ASBCA No. 14626, 70-1 BCA para. 8,222 (1970) (Order directed specifically at contractor not part of any continuing program or plan); Mid-East Engin. Associates, Inc., ASBCA No. 12622, 68-1 BCA para. 7,066 (1968) (Government action or order should not effect only a particular contractor nor be confined or related to the performance of a particular contract).

<sup>121</sup>It is in ascertaining whether the act is local and specific in application or directed at the particular contract or contractor that the identity of the interfering actor has played a major role. The breadth of the effect is directly related to the authority of the actor. This conclusion follows logically from the reduced authority of government actors at lower levels of Government. Thus, actions of the contracting agency generally can affect only the contracts of that agency and actions of the contracting officer can only affect those contracts for which that officer is responsible. Applying this analysis to the decisions of the courts and boards provides significant insight into what constitutes an act of public and general application. At the same time, acts which have national effect and apply equally to contracts between private parties clearly comply with the requirements of this element.

either local and specific or directed at the contract are initiated by the contracting agency, if not the contracting officer.<sup>122</sup> The clearest examples of acts not qualifying for protection under the doctrine are found where only one contractor is effected by the act and the application is purely local.

#### **1. LOCAL AND SPECIFIC APPLICATION PREVENTS PROTECTION**

Acts of local and specific application are not public and general acts and therefore do not qualify for protection under the sovereign acts doctrine. In Franchi Construction Co.,<sup>123</sup> the Board was confronted with a local act that affected a single contractor and held that the doctrine did not apply. There the contract was for the removal of old and the construction of new barracks at Ft. Devens, Massachusetts. The contractor submitted his bid based upon the assumption that material from the old barracks could be burned on post and thus not have to be hauled away. The contract provided, inter alia, that all rotten wood "shall be burned." Subsequent to award, the contractor attended a pre-construction conference at which he was informed that no burning would be allowed on post. The ban was in response to

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<sup>122</sup>Some local acts are the mere implementation of acts by higher authority, which do not affect the status of the act as public and general, Goodfellow Brothers, Inc., AGBCA No. 75-140, 77-1 BCA para. 12,336 (1977). Even in these cases, however, where the contracting agency has discretion the act may be found to be local and specific and directed at the contract rather than public and general. See, infra notes 174 and 202 and accompanying text. Where the courts or boards have denied the protection of the sovereign acts doctrine for failing to meet this requirement, the act normally has been purely local and specific or directed at the contract or contractor.

<sup>123</sup>ASBCA No. 16735, 74-2 BCA para. 10,654 (1974).

the complaints about burning refuse lodged by the residents of a nearby neighborhood. The contractor filed a claim for the additional cost associated with hauling the debris off post. The Government defended that the regulation<sup>124</sup> prohibiting burning was a sovereign act. The Board, in rejecting this defense observed:

The very department of the Government that entered into this contract with the appellant also prohibited the burning of the debris. The purpose of the ban was to assuage the complaints of local residents and was not in furtherance of a national purpose. We cannot ascribe sovereignty to this purely local act.<sup>125</sup>

Similar considerations were employed in R&R Enterprises<sup>126</sup> and Adams Manufacturing Co.<sup>127</sup> In the former case, the contract was with the National Park Service for appellant to operate a concession resort in a national forest. At the time the contract was entered into the Park Service was planning to conduct water and sewage construction, but failed to inform the appellant. When construction commenced, the sewage and water service at the resort was interrupted, which in turn caused the resort to be unusable. The appellant filed a claim for damages resulting from the interruption of service, which was denied by

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<sup>124</sup>The contract contained a provision requiring the contractor to comply with, inter alia, all post regulations. The regulation in question was found by the Board to be a fire prevention regulation that post personnel had attempted to use as the regulatory authority for prohibiting the burning. The Board summarily rejected this attempt.

<sup>125</sup>74-2 BCA at 50,598.

<sup>126</sup>Supra note 97.

<sup>127</sup>GSBCA No. 5747, 82-1 BCA para. 15,740 (1982) aff'd without pub. op., 714 F.2d 161 (Fed. Cir. 1983).

the agency. Before the Board, the Government maintained that the construction project was a sovereign act for which the Government was not liable. After opining that the Government agency that entered into the contract with appellant owed the appellant a duty to cooperate,<sup>128</sup> the Board observed:

[W]e also question whether a construction project solely affecting a single contractor who has an exclusive possessory interest in the entire parcel of real estate affected by the project has in any way the breadth or scope necessary for it to be construed as a sovereign, rather than proprietary, act.<sup>129</sup>

In Adams Manufacturing, appellant contracted with the General Services Administration (GSA) to provide the Government's requirements for storage cabinets. Following award of the contract, the Director of the Office of Management and Budget and the Director of GSA imposed a freeze and moratorium, respectively, on the acquisition of furniture. The Government refused to determine its requirements until the moratorium was lifted. The appellant filed a claim for breach of contract, which was denied by the contracting officer.

Before the Board, the Government unsuccessfully asserted that the freeze and moratorium was a sovereign act. In examining the Government's defense the Board differentiated between a public and general act that indirectly affected the contractor and the Government's actions in this case.

[F]or example, a declaration by the Occupational Safety and Health Administration that cabinets of the sort manufactured by appellant presented severe safety

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<sup>128</sup>See, infra Section IV.

<sup>129</sup>Id. at 109,153.

hazards, followed by a ban of the storage cabinets from the entire market, would have the incidental effect of preventing appellant from performing its contract with GSA but would indisputably be a sovereign act. Here, in contrast, what occurred was neither more nor less than the refusal of the Government to honor a contractual obligation; that refusal did not rest on some other action taken by a different component of Government in its sovereign capacity, it was an act taken within the specific context of the procurement of office furniture. Indeed, the original moratorium came from within the procuring agency itself; it was a transparent breach of contract with no sovereign justification at all.<sup>130</sup>

Thus, the failure of the Government to determine its requirements, contrary to the mandate of the contract, was held not to be a protected sovereign act. It should be noted that the decision here was not based upon the failure to order cabinets because the agency had no requirements, but rather upon the failure to determine whether the agency had any such requirements. While the distinction drawn by this decision may appear academic, the true explanation for the decision was set forth by the Board when it stated:

Our findings indicate that the moratorium and freeze were riddled with exceptions, and this alone weakens [the] argument [that the moratorium and freeze were public and general acts]. But even more important, the measure of whether an alleged sovereign act is public and general depends upon whether private parties situated as was the procuring agency could have claimed an excuse by the act taken by the Government; here GSA alone was prevented from

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<sup>130</sup> Adams Manufacturing, supra note 97 at 77,889. This distinction is on all fours with the example set forth by the court in Sunswick Corp. v. United States, 109 Ct. Cl. 772, 799, 75 F. Supp. 221, 229, cert. denied, 334 U.S. 827 (1948). Cf., Hills Materials Co., ASBCA Nos. 42410, 42411, 42413, 92-1 BCA para. 24,636 (1991) (implementation of OSHA safety standards held to be a sovereign act).

purchasing appellant's cabinets by the moratorium.<sup>131</sup>

## 2. DIRECTED AT CONTRACT OR CONTRACTOR PREVENTS PROTECTION

Because only acts that indirectly affect the contractor or his contract qualify for protection under the sovereign acts doctrine, Governmental acts that are directed at a particular contractor do not qualify for protection under the doctrine. The concept of indirect effect is best exemplified by Overhead Electric Co.<sup>132</sup> In that case, the contractor's performance was rendered more expensive when, inter alia, the EPA closed down the contractor's intended disposal site for the PCB's that were to be removed from a construction site. The EPA had closed down the site, which was independent of the contractor, pursuant to its statutory authority to police landfills. The contractor claimed that this action, in addition to others,<sup>133</sup> prevented his performance. The Board, giving short-shrift to this

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<sup>131</sup> Adams Manufacturing, *supra* note 97 at 77,889. Empire Gas, *supra* note 94, has been interpreted to have employed a similar test for purposes of ascertaining whether the act in question was a sovereign act. See, Nero and Associates, *supra* note 96. In regards to the existence of exceptions, compare Hughes Communications Galaxy, Inc. v. United States, *supra* note 110 (granting Government motion for summary judgment in breach of launch services agreement based upon sovereign acts doctrine). In Hughes the President issued an order, following the explosion of the space shuttle "Challenger," limiting shuttle commercial payloads to satellites of national security and foreign policy importance, but allowed an exception for those satellites that had previously been manifested and were unable to be launched except by a space shuttle. The contractor argued, unsuccessfully, that the existence of the exception undermined the "public and general" nature of the act and therefore prevented it from being a sovereign act.

<sup>132</sup> ASBCA No. 25656, 85-2 BCA para. 18,026 (1985).

<sup>133</sup> See, infra text accompanying note 164.

argument, noted that the Government's actions in closing the disposal site was a sovereign act that "most certainly was not directed toward appellant even though the closure affected appellant."<sup>134</sup> In other words, the act merely affected the contractor and was not directed at him.

At the opposite end of the spectrum, Sun Oil Co. et al. v. United States<sup>135</sup> and South Louisiana Grain Services, Inc. v. United States<sup>136</sup> provide clear examples of Government action directed at the contractor.<sup>137</sup> In Sun Oil, the United States Department of the Interior had granted three oil companies oil leases under the Outer Continental Shelf Lands Act.<sup>138</sup> When the companies sought permits to install drilling platforms they were denied the permits by the Secretary of the Interior. The Secretary, contrary to the recommendations of those in the Department who had reviewed the plans, believed that the platforms posed a threat of harm to the environment. The companies filed suit claiming breach of contract. The Government defended that the determination of the Secretary was

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<sup>134</sup> Id. at 90,476.

<sup>135</sup> 215 Ct. Cl. 716, 572 F.2d 786 (1978).

<sup>136</sup> 1 Cl. Ct. 281 (1982) (denying defendant's motion for summary judgment).

<sup>137</sup> The court's decision in Everett Plywood falls within the prohibition against the act being directed at the contractor. While the court did not expressly discuss this point, the conclusion is inescapable. Whenever one specific contract is terminated by the contracting agency it stretches credulity to imagine that the interfering act was not directed at the contractor.

<sup>138</sup> 43 U.S.C. sec. 1331-43 (1970).

a protected sovereign act.

The Court of Claims, adopting the opinion of the trial judge, found that the denial of the permit lacked the "usual touchstone" for sovereign act applicability, in that the denial was not a public and general act. Instead, the denial was "directed principally and primarily at plaintiffs' contractual right to install a platform ... and to extract oil and gas therefrom. The doctrine of sovereign immunity [sic] does not insulate defendant from liability in such instances."<sup>139</sup>

This same analysis was employed in South Louisiana Grain Services, Inc. v. United States.<sup>140</sup> In that case the Government was in the process of converting the grain inspection services from private companies under government contract to a strictly Government operated service. Plaintiff maintained that, pursuant to an oral contract with the Government, it was entitled to conduct the grain inspections for a period of one year. Allegedly relying upon the Government's representation, the plaintiff expended a significant amount of money preparing to perform the services. Plaintiff's operations were federalized several months after commencing the work. Plaintiff filed suit seeking damages for the breach. In support of its motion for summary judgment, the Government asserted, inter alia, that the decision to federalize the grain inspection service was a sovereign act. Responding to this defense, in a footnote, the court noted that

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<sup>139</sup>Id. 215 Ct. Cl. at 768 (citing Ottinger v. United States, 116 Ct. Cl. 282, 285, 88 F. Supp. 881, 883 (1950)).

<sup>140</sup>Supra note 136 at 287 n.6.

the Government's "actions in this case were directed specifically at plaintiff's alleged contract performance and were applicable to it," in which case the protection of the doctrine was not applicable.<sup>141</sup>

The above cases clearly provide a distinction between those acts of the Government which are and are not directed at the contractor. Where the doctrine was held not to be applicable, only one contract was effected and the interfering agency was the contracting agency. It is possible that even where the interfering actor is the contracting agency, the public and general application standard may still be met.<sup>142</sup> This situation frequently arises where the contracting officer denies access to the work site to all individuals and contractors.<sup>143</sup>

At the same time, however, this is arguably the situation underlying the decision in Empire Gas,<sup>144</sup> which has been consis-

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<sup>141</sup>Id. at 287 n.6. The court first noted that the actions of the Government in this case were in its proprietary capacity not its sovereign capacity and thus the doctrine was not applicable.

<sup>142</sup>In many such cases the act is effective agency wide. This scope undermines a contractor's claim that the action was directed at him. See for example, Bared International Co., Inc., ASBCA No. 30048, 88-1 BCA para. 20,378 (1987) aff'd on reconsid., 88-3 BCA para. 21,139 (1988) (Navy's world wide increase in messing rates was a sovereign act). Also cf., Aden Music Co., ASBCA No. 28225, 87-3 BCA para. 20,113 (1987) (Department of Defense increase in military per diem rates was sovereign act).

<sup>143</sup>By and large these instances arise in the case of fire closures of national forests. See, infra note 223 and accompanying text.

<sup>144</sup>Supra note 94.

tently applied by the Armed Services Board of Contract Appeals.<sup>145</sup> In Empire Gas, the contract was to install underground fueling facilities at Loring Air Force Base. The work necessitated cutting the pavement of certain taxiways and aircraft parking areas at the base. During the performance period, President Eisenhower placed the American military on alert. Pursuant to this action by the President, Strategic Air Command placed Loring Air Force Base on alert. The following day, the base commander notified the contracting officer that any work involving cutting of any taxiway or aircraft parking area pavement was "strictly prohibited until further notice." Pursuant to this order, the contracting officer notified the contractor to limit its work in accordance with the aforementioned direction. The contractor filed a claim, under the suspension of work clause, for the period in which work was suspended because of the alert status of Loring. The Government defended that the suspension was pursuant to a sovereign act and the contracting officer served merely as a "conduit" for implementation of that act.<sup>146</sup> The Board rejected the Government's argument and held that the contracting officer's order was issued as an act of the Government in its contractual capacity, to which the doctrine was inapplicable.

It is difficult, at first glance, to reconcile this diver-

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<sup>145</sup>See, infra note 171 for cases subsequent to Empire Gas applying the analysis of that case.

<sup>146</sup>See for example Hawaiian Dredging & Construction, supra note 107 at 86,109, stating that agency actions to effectuate a sovereign act are as protected as the sovereign act itself.

gent treatment by the different boards under arguably analogous factual situations. One can hardly say that denying access to forests to perform a contract is any more important or serves any greater national purpose than the denial of access to a military installation during a period of increased security or alert by Presidential direction.<sup>147</sup> The only possible explanation lies in the number of contractors effected by the order. The facts contained in the decisions in Empire Gas,<sup>148</sup> Lane Construction Co.<sup>149</sup> and Federal Electric Corp.,<sup>150</sup> all of which limited the contractors' ability to perform because of security restrictions imposed on military installations, do not indicate that any other contractors were affected by the acts in question. In contrast, the facts in the forest closure cases<sup>151</sup> clearly indicate that everyone seeking admission to the forest,

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<sup>147</sup>See infra Section IV(A)(3) for a discussion of the role played by the nature of the interfering act vis-a-vis the duty to cooperate where the interfering actor is the contracting agency.

<sup>148</sup>Supra note 94.

<sup>149</sup>ENG BCA No. 1977, 1961 ENGBCA LEXIS 142 (September 1961).

<sup>150</sup>ASBCA No. 20490, 76-2 BCA para. 12,035 (1976).

<sup>151</sup>See, e.g., Gary Hegler, AGBCA No. 89-145-1, 1991 AGBCA LEXIS 61 (October 18, 1991) (appeal granted in part on other grounds); Lloyd H. Kessler, Inc., supra note 97; Goodfellow Bros., Inc., supra note 122; L.S. Matusek, ENG BCA No. 3080, 72-2 BCA para. 9,625 (1972) (appeal granted in part based upon contract language limiting risk assumed by contractor to "short periods"); James Farina Corp., ENG BCA 1807, unpub., (April 10, 1961).

for whatever purpose, was similarly excluded.<sup>152</sup> Thus, at least on the facts contained in the decisions, the military installation cases can be distinguished because the orders in those cases were of such limited application that it could not be concluded that they were not directed at the particular contractors. This analysis comports with the distinction<sup>153</sup> employed by the court as seen by comparing Everett Plywood<sup>154</sup> with Hedstrom Lumber<sup>155</sup>.

From all of this it appears that a public act of general application does not have to be applicable to the general population as long as it applies to everyone similarly situated to the individual contractor claiming injury. Such a rule is not unreasonable, but applying it to the military installation access cases justifies a conclusion that at least Empire Gas was incorrectly decided.<sup>156</sup> This result follows from the fact that any contractor seeking to perform on the installation or at a

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<sup>152</sup>There were exceptions to these closure orders, because the possibility existed for the granting of waivers to certain contractors who were evidently working in certain lower fire risk areas. See for example, Goodfellow Brothers, Inc., supra note 122 and Weaver Construction Co., supra note 103.

<sup>153</sup>The Claims Court's recent decision in Hughes Communications Galaxy, Inc. v. United States, Cl. Ct. 91-1032C, slip op. at 25 and 28 (April 13, 1992) confirms this distinction.

<sup>154</sup>Supra note 97.

<sup>155</sup>Supra note 93.

<sup>156</sup>In the other decided military access cases, while citing Empire Gas as authority, the contest was largely over whether the act in question was compensable under the changes or suspension of work clause, where the clauses did not specifically address the issue of sovereign acts.

particular location on the installation would have been prevented from performing under similar circumstances.<sup>157</sup> This criticism of the Empire Gas decision should not be interpreted as asserting that any act in furtherance of an important national purpose should justify treating the act in question as a protected sovereign act. While there is little case law regarding this element, analogous case law<sup>158</sup> clearly indicates that such an assertion would be unfounded.<sup>159</sup>

### C. IDENTITY OF THE INTERFERING ACTOR

In determining whether a particular governmental act is a

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<sup>157</sup>Arguably, the fact that such an order was limited, evidently, to contractors distinguishes these cases from the other cases discussed above. Cf. Philco-Ford, supra note 116 (requirement for specific pay applicable only to contractors performing under United States Public Contract Award). The problem with such a conclusion lies in the continued failure to take express account of the character of the acts which interfered with performance. There can be little argument with the assertion that actions taken by the Government pursuant to its security needs constitute sovereign acts. The explanation for the continued emphasis upon the fact that the contracting officer issued the order, whether in implementing the direction of higher authority or not, lies in the mechanical application of the elements of the doctrine while failing to answer the real question, is the interfering act the type of act that the Government must effect in order to continue its existence and fulfill its responsibilities under the law. If not, then reason should dictate that the act is not an act in the Government's sovereign and public capacity, but rather one in its contractual, proprietary or private capacity. This emphasis on the character of the act, however, must be distinguished from the purpose of the act. See, infra Section III(D).

<sup>158</sup>See infra Section III(D).

<sup>159</sup>The closest thing to such an assertion, but limited to a very specific type of act, is found in Chief Jones's dissent in David M. Miller v. United States, 135 Ct. Cl. 1, 14 (1956), where he opined that "[t]here are some things that go beyond the forms of law.... Here was a practical condition where there was a danger of world conflagration.... Is the nation to remain helpless in the presence of ... such a threat?"

sovereign act, the courts and boards consider the identity of the interfering agency in deciding whether the act in question was effected by the Government in its sovereign, rather than its contractual, capacity. This focus, as with the focus in the public and general element, reveals a disinclination by the courts and boards to identify a sovereign act by the nature of the act and instead centers upon the contractual relationship between the interfering agency and the contractor.<sup>160</sup> Under this element the courts and boards ascertain whether the interfering agency was a different agency or the contracting agency and the role of the contracting officer in the action that gave rise to the claim.

### **1. DIFFERENT AGENCY**

As mentioned in Section II, above, the classic and most clear-cut applications of the protection afforded by the sovereign acts doctrine are found where the source of the interfering act is a different agency. Where there is a "significant bond" between the interfering agency and the contracting agency, however, the courts and boards generally do not analyze the interfering act as that of a different agency. The cases in the first subsection exemplify the types of acts by a different

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<sup>160</sup>While the courts and boards have not addressed the cases by the type of governmental act involved, an attempt has been made, where possible, to categorize the different types of governmental acts in an effort to provide the reader with some concept of the type of acts that have been held to be sovereign acts. In many instances there is a direct relationship between the identity of the interfering agency and the character of the interfering act. In those cases it is arguable that the character of the interfering act impliedly has been considered.

agency to which the courts and boards have afforded protection under the sovereign acts doctrine. The second subsection addresses the effect of a "significant bond" between the interfering and contracting agencies.

**a. INTERFERING ACTS BY TRULY INDEPENDENT AGENCY**

The cases involving a different interfering agency are relatively easy to characterize by the type of governmental act and clearly reflect sacrificing the interests of the individual contractor for the sake of the national welfare.

**i. ENVIRONMENTAL REGULATION**

In the area of environmental regulation, there is little room for question that the promulgation of environmental regulations, by an agency other than the contracting agency,<sup>161</sup> clearly constitute protected sovereign acts.<sup>162</sup> In addition to Broadmoor Corp. mentioned above,<sup>163</sup> other cases involving environmental regulation present some of the most recent examples of this situation.

In Overhead Electric,<sup>164</sup> the contract was for the replace-

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<sup>161</sup>Compare Franchi Construction Co., *supra* note 107 where the contracting agency's regulation, purportedly imposing an environmental safeguard against the pollution caused by the burning of refuse, was held to be a local and specific act not qualifying for protection under the doctrine.

<sup>162</sup>Cf., Radiation Facilities, Inc., AGBCA No. 265, 71-1 BCA para. 8638 (1971) (change in Department of Transportation regulations, after submission of bid on contract with Department of Agriculture, regarding transport of radioactive material was sovereign act).

<sup>163</sup>See *supra* note 89 and accompanying text.

<sup>164</sup>ASBCA No. 25656, 85-2 BCA para. 18,026 (1985).

ment of an electrical system and necessitated the disposal of materials containing polychlorinated biphenyls (PCB's). The Environmental Protection Agency (EPA) promulgated a regulation that would substantially increase the costs of disposing of such materials. The contractor alleged that the increased costs prevented his performance without incurring a substantial loss. He therefore refused to perform and was terminated for default. The Board held that the issuance of the regulations, pursuant to EPA's general statutory authority, was a protected sovereign act and, as related to the issues pertinent here, denied the appeal. While the notice of the regulatory change in this case was "published" prior to the issuance of the IFB, the timing of the change appears to have little effect upon the application of the doctrine.

In Warner Electric, Inc.,<sup>165</sup> the contractor entered into a contract with the Veterans' Administration to replace an electrical distribution system at a Veterans' Hospital. In preparing its bid, the contractor considered the amount that he would realize on exporting and selling the old transformers. The Board found that the contractor was unaware that the transformers contained PCB's. Following contract award, the EPA promulgated a regulation prohibiting exportation of items containing PCB's. In holding that the imposition of the prohibition was a protected sovereign act, the Board emphasized that the action which caused appellant the loss was not an act

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<sup>165</sup>VABC No. 2106, 85-2 BCA para. 18,131 (1985).

of the contracting agency and not executed by the Government in its contractual capacity.<sup>166</sup> Even though Broadmoor Corp., Warner Electric, and Overhead Electric all involved EPA regulations, a similar result is obtained where the environmental requirements are imposed pursuant to congressional statute.<sup>167</sup>

### ii. REGULATION OF COMPETITION

Another recent development in the different agency scenario is the application of the automatic stay provision of the Competition in Contracting Act (CICA).<sup>168</sup> While not yet litigated to the extent that the environmental regulations have been, when the effect of the stay has been addressed it has been held to be a protected sovereign act. The stay provision of CICA requires the agency to stay performance of a contract when

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<sup>166</sup>The Board noted that while there may have been increased costs associated with disposal of the transformers, following implementation of the EPA regulation, no such costs were alleged.

<sup>167</sup>See, e.g. Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir.) cert. denied, 111 S.Ct. 46 (1990) (Congressional enactment of the Uranium Mill Tailings Radiation Control Act which rendered performance of uranium production contracts, between plaintiff and Atomic Energy Commission, substantially more expensive was a sovereign act for which the Government was not liable). Accord, Pacific Northern Timber Co., AGBCA No. 77-172-5, 91-1 BCA para. 23,309 (1990) (Government's redetermination of stumpage rate, 20 years after execution and 30 years before termination of a long term timber contract, pursuant to the National Forest Management Act, was sovereign act for which Government not liable in damages). Also see, Hedstrom Lumber Co. v. United States, 7 Cl. Ct. 16 (1984) (Cancellation of seven timber sales contracts in a particular section of a national forest, pursuant to congressional enactment of Boundary Waters Canoe Area Wilderness Act, was sovereign act for which Government not liable beyond the just compensation set forth in statute).

<sup>168</sup>31 U.S.C. sec. 3553(d).

the agency receives notice of an award protest filed within ten days of award and was the subject of appeal in Port Arthur Towing Co.<sup>169</sup>

In Port Arthur Towing Co., (PATCO) the contract was to provide barge towing services for the Department of Defense. The tender, which did not require nor contain a suspension of work clause, was accepted by the Government on March 1, 1989, and required PATCO to maintain available barge service beginning March 12, 1989. In order to be ready to perform the contract on time, PATCO began mobilizing and preparing for performance when it received its schedule, in accordance with the contract. On March 10, 1989, a disappointed bidder protested the award and contracting personnel ordered performance under the contract suspended. The stay was lifted on April 13, 1989. PATCO filed a claim for the portion of the stay period between April 1 and April 13. The claim was denied and PATCO appealed.

Before the board and, on appeal to the United States District Court for the District of Columbia,<sup>170</sup> the Government invoked the sovereign acts defense. The Board held that because the suspension ordered by the contracting personnel was mandated by CICA the stay constituted a sovereign act, for which the

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<sup>169</sup>ASBCA No. 37516, 90-2 BCA para. 22,857 (1990), aff'd, Port Arthur Towing Co., Inc. v. Dept. of Defense et al., \_\_\_ F. Supp. \_\_\_, 1991 U.S. Dist. Lexis 9456 (1991).

<sup>170</sup>Appeal was to this court because it involved a maritime contract. See Southwest Marine of San Francisco, Inc. v. United States, 896 F.2d 532, 535 (Fed. Cir. 1990). Port Arthur Towing Co., supra note 169, 1991 U.S. Dist. Lexis 9456 at \*1 n. 1.

Government was not liable.<sup>171</sup>

On appeal to the federal district court, PATCO argued that because the contracting agency had the authority to authorize performance, despite the protest, the action staying performance was an act of the contracting agency and not that of Congress.<sup>172</sup> The district court held that "[p]ractically the [contracting] agencies have almost no discretion" as to whether the stay should be implemented.<sup>173</sup> This practical absence of discretion resulted in "the agency ... simply following the directives of CICA. In those instances, the law passed by Congress and signed by the President, not the agency, [was] the motivating force behind the stay."<sup>174</sup> Thus, the court held that

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<sup>171</sup>This holding must be contrasted with this same Board's decision in Empire Gas, supra note 94. In that case, the Board opined that the fact that the suspension of work order was issued by the contracting officer constituted "almost conclusive proof" that the act was not a sovereign act. Id. at 17,128. In both cases the decision to stop performance was made by an authority far above the level of the contracting officer, who acted merely as a conduit for these directions. This decision by the ASBCA may represent a retreat from its position established in Empire Gas and consistently applied since. See, e.g., Philco-Ford Corp., supra note 116; Federal Electric Corp., supra 150. Also see, infra Section III(C). There are two distinctions between the facts of these cases. In Empire Gas the President placed the military on alert, thus precipitating the suspension. Also, in Empire Gas there was a suspension of work clause in the contract. See infra Sections III(D) and IV for further discussions on this point.

<sup>172</sup>This attempt makes no readily apparent sense in view of the "dual capacity" theory. The attempt, however, reflects the realization that despite an agency's "dual capacity," contractors recover much more often where the interfering agency is the contracting agency. See Sections III(C)(2)(a) and IV, both infra.

<sup>173</sup>1991 U.S. Dist. Lexis 9456 at \*10.

<sup>174</sup>Id. at \*11.

the interfering act was the sovereign act<sup>175</sup> of a different agency and applied the sovereign acts doctrine.<sup>176</sup>

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<sup>175</sup>This decision reflects one of the most troubling facets in the application of the sovereign acts doctrine: concentrating upon the contractual relationship between the contractor and the interfering agency, while ignoring the type of action involved. Here the Government engaged in an ordinary aspect of commerce, contracting with a private citizen to supply towing services for fuel oil barges. See Oklahoma Gas & Electric Co., *supra* note 108. The Government's status as a sovereign played little, if any, role in the contract. See Yosemite Park & Curry Co., *supra* note 108. Also *cf. American Ensign Van Service et al. v. United States*, 220 Ct. Cl. 681, order (1979) (Military decision to close port based solely upon financial savings consideration was act of Government in proprietary, not sovereign, capacity). The argument that Congress's purpose in enacting the statute was to "promote fair competition," Ameron v. United States, 809 F.2d 979 (1986), does not grant carte blanche authority for its use, nor change the position that the Government occupies in such transactions. Furthermore, the fact that a national purpose may be fulfilled through such an act does not, of itself, justify characterizing the interference as an act by the Government in its sovereign capacity for purposes of applying the doctrine. Fulfillment of a national purpose, alone, is an insufficient justification for relieving the government of liability for the consequences of its acts. See, e.g., United States v. Bethlehem Steel Co., 315 U.S. 289 (1942) (repudiation of Government contracts by Congress because it believed that the contractors were earning unconscionable profits constituted a taking under the Fifth Amendment). Also see *infra* Section III(D). While the result in Port Arthur Towing may be an anomaly in the application of the doctrine, see 5 Nash & Cibinic Report, para. 55 (noting that this decision is one of the exceptions to the otherwise successful weeding out of the wheat from the chaff in this area), it is not unique. See e.g., Air Terminal Services, Inc. v. United States, 165 Ct. Cl. 525, 330 F. Supp. 974, *cert. denied*, 379 U.S. 829 (1964) (contract for provision of parking services at National Airport where the government's installation of parking meters was held to be a sovereign act).

<sup>176</sup>This result should be contrasted with Hill Brothers Construction Co., ENG BCA No. 5686, 90-3 BCA para. 23,276 (1990), where the Board allowed recovery under the contract's "Protest After Award" clause, distinguishing Port Arthur Towing by the absence of such a clause. Given the reduction of the Government budget and the likely concomitant increase in the number of award protests, a valid argument can be made that the "Protest After Award" clause should be included in all Government contracts under the implied duty to not hinder performance. See, *infra* Section IV.

### iii. ECONOMIC CONTROLS AND FISCAL POLICY

While the environmental regulation and the CICA stay provision cases represent the newest entrants in the decisional law relating to the protection afforded the acts of noncontracting agencies, the greatest single number of protected sovereign acts are found in cases addressing contractor injury resulting from governmental policies effecting wage and price freezes and controls.<sup>177</sup>

The wage and price control cases invariably involved a Government agency, pursuant to statutory authority, setting minimum wages or instituting "price freezes," which, in the absence of an escalation clause, rendered the contractor's performance more costly. In the wages area, the statutory authority emanated from Congress and was implemented by various agencies, none of whom was the contracting agency.<sup>178</sup> With very

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<sup>177</sup>In 1975 Peter Latham opined that inflation, recession, and federal intervention prompted an increase in the costs of supplying goods and services to the Government. These increased costs translated to increased claims and "more vigorous defenses thereto by the government." Latham, The Sovereign Act Doctrine In The Law of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 29, 30 (1975) (hereinafter Latham). Thus, difficult economic circumstances apparently set the stage for increased litigation over expenses. This conclusion is borne out by the cycle of cases involving economic controls and fiscal policies associated with scarce resources and limited budgets.

<sup>178</sup>Institute of Modern Procedures, Inc., ASBCA No. 17303, 73-1 BCA para. 9,820 (1972) (Minimum Wage and Industrial Safety Board, Government of the District of Columbia pursuant to congressional enactment); Paramount Cleaners, ASBCA No. 15508, 73-2 BCA para. 10,181 (1973) (Dept. of Labor, pursuant to Service Contract of 1965); Meteriq Corp. v. United States, 192 Ct. Cl. 515, 427 F.2d 778 (1970) (Dept. of Labor, pursuant to Fair Labor Standards Act and Davis-Bacon Act); Dyer & Dyer, Inc., ENG BCA No. 3429, 74-1 BCA para. 10,636 (1974) (Executive Order, pursuant to Economic Stabilization Act of 1970); Santa Fe Engineers,

few exceptions<sup>179</sup> these actions were found to be sovereign acts.

A slight factual variation on the setting of minimum wages are those cases where, again pursuant to legislative or executive order, a wage or price "freeze" that existed at the time of bidding was lifted during the performance period, again resulting in higher than anticipated costs for the contractor. In each case the contracts contained neither an escalation clause nor an adjustment clause for increases resulting from sovereign acts. Also, as with the minimum wage cases, the interfering agency was not the contracting agency. In each case the action was held to be a protected sovereign act by the Government.<sup>180</sup>

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ASBCA No. 17905, 73-2 BCA para. 10,068, reconsid. denied, 73-2 BCA para. 10,254 (1973) (Executive Order, pursuant to Economic Stabilization Act of 1970); Cleanco Co., ASBCA No. 12419, 67-2 BCA para. 12419 (1967) (Dept. of Labor, pursuant to Fair Labor Standards Act Amendments of 1966).

<sup>179</sup>The exceptions were Sunswick Corp. v. United States, *supra* note 130 and Philco-Ford Corp., *supra* note 116. In both cases, the court and board, respectively, found that because the wage rate was not simply the minimum wage rate, but in fact was the exact wage rate, and because only the particular contract was effected the Government's actions were not public and general. See *supra* Section III(B).

<sup>180</sup>Lifting of wage freeze imposed pursuant to Economic Stabilization Act of 1970: Blake Construction Co., GSBCA No. 4118, 75-1 BCA para. 11,278 (1975). Lifting of price controls pursuant to statute and/or Executive Order: Tony Downs Foods Co. v. United States, 209 Ct. Cl. 31, 530 F.2d 367 (1976); M.D. Funk, ASBCA No. 20287, 76-2 BCA para. 12,120 (1976) (appeal granted on other grounds); Landes Oil Co., ASBCA No. 22101, 78-1 BCA para. 12,910 (1977); Butler Aviation, Inc., ASBCA No. 21133, 77-1 BCA para. 12,399 (1977); McGrail Equipment Co., ASBCA No. 20555, 76-1 BCA para. 11,723 (1976); Flintkote Co., GSBCA Nos. 4223, 4313, 76-1 BCA para. 12,301 (1976) (default termination converted to convenience termination on other grounds); Wear Ever Shower Curtain Corp., GSBCA No. 4360, 76-1 BCA para. 11,636 (1975); Ross Industries, ASBCA No. 19563, 75-1 BCA para. 11,212

Not unexpectedly, similar results were obtained in appeals resulting from the Government's actions affecting the value of the United States' dollar,<sup>181</sup> increased employer's social security contributions,<sup>182</sup> increases in workmen's compensation premiums,<sup>183</sup> and the declaration of additional holidays.<sup>184</sup> The nature of these acts,<sup>185</sup> and the identity of the interfering agency clearly sets them apart as clearly protected sovereign

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(1975). Lifting of price controls pursuant to Emergency Petroleum Allocation Act of 1973: Martin K. Eby Construction Co., IBCA No. 1389-9-80, 81-1 BCA para. 15,052 (1981); Read Plastics, Inc., GSBCA Nos. 4159, 4206, 4246, 77-2 BCA para. 12,609 (1977). An example of a similar result from an earlier period, where price controls had been imposed pursuant to Emergency Price Control Act of 1942, is: Piggly Wiggly Corp. v. United States, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949) (citing Yakus v. United States, 267 U.S. 414). Also cf., Glasgow Associates v. United States, 203 Ct. Cl. 532, 495 F.2d 765 (1974) (increase of FHA guaranteed interest rate was protected sovereign act citing, Anthony P. Miller, Inc. v. United States, 161 Ct. Cl. 455 (1963)).

<sup>181</sup>The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871); Andrew P. Teller, et al. v. United States, 227 Ct. Cl. 519 (1981); Ari Insaat A.S., ASBCA Nos. 17767, 17783, 18518-19, 75-1 BCA para. 11,290, at 53,809-10 (1975); Zena Co., ASBCA Nos. 18239, 18883, 75-1 BCA para. 11,024, at 52,498-90 (1975); Alco Metal Stamping Corp., ASBCA No. 19215, 74-2 BCA para. 10,736 (1974).

<sup>182</sup>Preston Haglin Co., VABC No. 623, 67-2 BCA para. 6629 (1967).

<sup>183</sup>Contract Services, Inc., ASBCA No. 18954, 74-1 BCA para. 10,520 (1974).

<sup>184</sup>Holmes & Narver Services, Inc., ASBCA Nos. 38867 and 38868, 90-3 BCA para. 23,198 (1990).

<sup>185</sup>A comparison the type of acts involved here with the nature of the Government's act in Port Arthur Towing, supra note 169, illustrates the distinction between what should be sovereign acts and the unreasonable extension of the coverage of the doctrine represented by Port Arthur Towing and Air Terminal Services. See supra note 175.

acts.

#### iv. PRIORITY RESOURCE ALLOCATION SYSTEMS

Other clear examples of protected sovereign acts are found in the area of Government established priority resource allocation systems. While the establishment of such systems is a protected sovereign act,<sup>186</sup> the activities of the contracting agency may create liability to the contractor through the former's negligence, willful misconduct<sup>187</sup> or the presence of a contract clause permitting recovery.<sup>188</sup> The confusion found in this area relates not to the establishment of the priority system by the different agency, but rather to the actions of the contracting agency in using the system.<sup>189</sup> In such situations the question becomes is the priority system the cause of the interfering act or are the actions of the contracting agency the

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<sup>186</sup>Bruno New York Industries Corp. v. United States, 169 Ct. Cl. 999, (1965). Accord: Henry A. Carey v. United States, 164 Ct. Cl. 304, 326 F.2d 975 (1964); Aragona Construction Co. v. United States, 165 Ct. Cl. 382 (1964); Barnes v. United States, 123 Ct. Cl. 101, 124-25 (1952); Pearson, Dickerson, Inc. v. United States, 115 Ct. Cl. 236, 261-262 (1950); J.F. Barbour & Sons v. United States, 104 Ct. Cl. 360 (1945); Gothwaite v. United States, 102 Ct. Cl. 400 (1944). Any confusion that appears to exist in this area is the result of the actions of the contracting agency in establishing the contractor's priority. Such actions are discussed infra in Section IV(A).

<sup>187</sup>Peter Kiewit Sons' Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957). Also see infra Section IV.

<sup>188</sup>M.D. Funk, supra note 180. Accord, Universal Power Corp. v. United States, 112 Ct. Cl. 97 (1948).

<sup>189</sup>Cf., Constructors-Pamco, ENG BCA No. 3468, 76-2 BCA para. 11,950 (1976) (Operation of flood control dams was sovereign act, but requiring contractor to work through the turbulence created by the operation of the dam was contractual act, for which appellant was allowed to recover).

source of the interference? It is the presence of contracting agency discretion which may convert the source of interference from the different agency to the contracting agency. An analogous situation is presented by the allocation of funds to an agency's contracts, where Congress has appropriated less than the full amount necessary to fund all contracts .

#### v. CONTRACT FUNDING

There is little question that congressional appropriation decisions are sovereign acts.<sup>190</sup> Where Congress simply appropriates insufficient funds and the agency has discretion to allocate those funds the issue is not so clear. Resolution of the availability of protection under the sovereign acts doctrine, in the latter situation, is largely dependent upon the actions of the contracting agency in the funding process.

The vast majority of funds spent by federal agencies are appropriated by Congress. Under the Anti-Deficiency Act<sup>191</sup> agencies are prohibited from spending more than Congress has appropriated. Thus, clearly the amount of funds available for agency expenditure originates with and is limited by an act of Congress. From this it is not unreasonable to conclude that any shortage of funds to pay for work, resulting from Congress's

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<sup>190</sup> Winston Brothers Co. v. United States, 131 Ct. Cl. 245, 130 F. Supp. 374 (1955). Furthermore, the "inaction of Congress in appropriating funds cannot be regarded as an act of the contracting officer." Granite Construction Co., IBCA No. 947-1-72, 72-2 BCA para. 9762 at 45,584 (1972) (Act of President in impounding funds appropriated for contract could not be regarded as act of contracting officer).

<sup>191</sup> 31 U.S.C. sec. 1341(a).

failure to appropriate sufficient funds to cover all of an agency's contracts, would be a protected sovereign act.<sup>192</sup> Furthermore, where the contract contains a "Funds Available for Payment"<sup>193</sup> clause it is arguable that the contractor has assumed the risk of the unavailability of funds.<sup>194</sup> Nevertheless, the Court of Claims has concentrated upon the discretion of the contracting agency in deciding whether the cause of the shortage of funds was the result of the contracting agency or a different agency, i.e. Congress. It is the court's focus upon the contracting agency's discretion that makes the outcome of such issues uncertain. The significance of this focus is that the boards are apparently focussing upon the identity of the interfering actor almost to the exclusion of the nature of the interfering act.<sup>195</sup>

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<sup>192</sup>Winston Brothers Co. v. United States, 131 Ct. Cl. 245, 130 F. Supp. 374 (1955). S.A. Healy Co. v. United States, 216 Ct. Cl. 172, 185, 576 F.2d 299, \_\_\_ (1978).

<sup>193</sup>Such clauses typically state that the Government is not liable for any damages associated with the contract because of a lack of funds.

<sup>194</sup>Gunther and Shirley Co., ENG BCA No. 3691, 78-2 BCA para. 13,454 (1978).

<sup>195</sup>This focus is not restricted to the area of contract funding, but instead appears to permeate analysis of the application of the doctrine, especially where the interfering act is violative of the contracting agency's implied duties under the contract. See infra Section IV(A). The results of such a focus, at least in the area of allocation of funds, arguably avoids any analysis of the nature of the act and instead makes dispositive the identity of the actor.

In Winston Brothers Co. v. United States<sup>196</sup> Congress failed to appropriate sufficient funds to fully fund the agency's contracts. The Bureau of Reclamation, the contracting agency, had originally requested an amount sufficient to fund all of its contracts. That amount was subsequently pared down by the Department of the Interior. Congress ultimately appropriated 25% of the amount originally requested by the Bureau. The plaintiff's contract, therefore, was not fully funded. The plaintiff claimed that sufficient funds were available to fully fund its contract, but were not so allocated by the agency. This action by the agency, the plaintiff maintained, circumvented the "Funds Available for Payment" clause, because funds were available, but the agency chose to fund all contracts partially, rather than plaintiff's contract fully. The court found that in allocating the funds between its contracts, the contracting agency "acted rationally and in a nondiscriminatory fashion." The court further found that it was the failure of Congress to appropriate sufficient funds that caused the funding shortfall. Under these facts the sovereign acts doctrine precluded liability.

The holding in Winston Brothers must be contrasted with the court's decision in S.A. Healy Co. v. United States.<sup>197</sup> In the latter case, under somewhat analogous facts, the court held that the presence of the "Funds Available for Payment" clause did not

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<sup>196</sup>Supra note 190.

<sup>197</sup>216 Ct. Cl. 172, 576 F.2d 299 (1978).

relieve the agency of liability, because the contracting agency had failed to request sufficient funds to fully fund all of its contracts. The Government asserted that the "Funds Available for Payment" shifted the risk of insufficient appropriations to the contractor. In response, the court observed that Congress appropriated all funds requested by the contracting agency. The court concluded,

[w]hether or not the funds available clause clearly allocates all risk of loss to the contractor when Congress cuts budget requests, we hold that the clause as a whole is not sufficient to shift this burden to the contractor when the administrative agency is at least partly to blame for the shortage of funds.<sup>198</sup>

Thus, the court has drawn a distinction between the acts of the contracting agency and the acts of Congress that ultimately result in failures to fully fund an existing contract.

Despite rejection of this distinction by the Corps of Engineers Board of Contract Appeals,<sup>199</sup> it was employed by the Armed Services Board of Contract Appeals in DWS, Inc.<sup>200</sup> In DWS Inc., the appellant had a "fully funded" fixed price contract to

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<sup>198</sup> Id. 216 Ct. Cl. at 185. Also see

<sup>199</sup> See Gunther and Shirley Co., Supra note 194. There the Board opined "[w]ith due respect to the Court of Claims, it is this Board's judgment that it is hardly possible to devise language which more clearly and more specifically allocated the risk of a shortage of funds to the contractor alone than that contained in the Funds Available for Payment clause..." Id. at 65,756. The distinction employed by the court has been accepted by other boards. See, e.g., DWS, Inc., supra note 101. Also cf. Granite Construction Co., supra note 190 (Presidential impoundment of funds could not be regarded as act of contracting officer).

<sup>200</sup> ASBCA No. 33245, 87-3 BCA para. 19,960, appeal denied on other grounds (1987).

provide flight training services for U.S. Army helicopter pilots. The contract was terminated for default for various reasons, not the least of which was the contractor's refusal to perform after the number of students to be trained was reduced substantially. The contractor maintained that the reduction constituted a partial termination for convenience. Furthermore, the contractor asserted that he had not assumed the risk of the reduction in appropriations to fund the training. The Government responded that the reduction in appropriations was a sovereign act by Congress for which the agency was not liable and therefore default termination was proper. The reduced appropriations were the result of the enactment of the Gramm-Rudman Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman).<sup>201</sup>

The Board accepted the Government's averment that the enactment of Gramm-Rudman was a sovereign act, but noted that the act only addressed the amount of the appropriation and not how it was to be allocated by the agency. The Board concluded that the amount appropriated to the Army was to be allocated by the agency based upon its discretion. Thus, the fact that appellant's contract was not allocated the full amount of funds required was a contracting agency decision. The Board continued, "[t]he retention by the Army of discretion as to how to allocate its remaining funds [those after the reduction mandated by Gramm-Rudman] convinces us that the reduction of

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<sup>201</sup>P.L. 99-177, 99 Stat. 1038.

funds in this contract was not a sovereign act of Congress, but a contractual action of the Government."<sup>202</sup> This conclusion can only be explained by the fact that the contracting agency performed a purely contractual act that private companies and individuals do on a daily basis, i.e. where to spend funds in the face of competing demands.<sup>203</sup> As a contractual act, the act did not fall within the protective shield of the sovereign acts doctrine.

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<sup>202</sup> Id. (citing C.H. Leavell & Co. v. United States, 208 Ct. Cl. 776, 530 F.2d 878 (1976) and S.A. Healy Co., supra note 197) Arguably this conclusion represents at least an expansion, if not a repudiation, of the court's decision in Winston Brothers, supra note 190. In Winston Brothers, the court opined that the "Funds Available for Payment" clause meant "that where the agency authorized to spend the appropriation allocates the funds on a rational and nondiscriminatory basis and they prove insufficient, the Government is not liable for harm resulting from the shortage." Id., 131 Ct. Cl. at 254. In DWS, Inc., there was no finding that the agency's action were irrational or discriminatory. Thus, the presumption is that they acted properly and reasonably, United States v. Chemical Foundation, Inc., 272 U.S. 1, 15-15 (1926) (presumption that public officials perform their duties in a proper manner); Horne v. United States, 190 Ct. Cl. 145, 150, 419 F.2d 416, 419 (1969) (presumption that public officials discharge their duties prudently and well). Nevertheless, the simple retention of discretion by the agency as to how to allocate the funds apparently rendered the funding shortage a contractual act, vitiating the protection of the sovereign acts doctrine.

<sup>203</sup> This discretion factor also figured prominently in the Port Arthur Towing, see supra note 169 and accompanying text. Also see American Ensign Van Service, et al. v. United States, supra note 175. In that case the Government, after entering into a contract for the movement of household goods between the United States and Korea, decided for cost savings reasons to close one of the ports. The effect was to render performance of the contracts more expensive. The contractors filed a claim and the Government defended upon the basis of the sovereign acts doctrine. The court stated that the action, with its underlying rationale, was "more akin to the Government's proprietary and commercial functions than it [was] an exercise of the sovereign powers of the United States..." Id. at 683.

## vi. SPECIAL PERMIT REQUIREMENTS

In some cases the Government has imposed special permit requirements which effect the contractor or may serve as pre-conditions to performance. Generally, these requirements constitute protected sovereign acts, but the question has been litigated infrequently. In Inter-Mountain Photogrammerty, Inc.,<sup>204</sup> appellant was awarded a contract by the Forest Service, U.S. Department of Agriculture, for the photogrammetric mapping of a national forest. In submitting its bid, appellant had relied upon the use of a Canadian subcontractor to supply the aircraft. The Department of Transportation (DOT), pursuant to a long standing policy,<sup>205</sup> had denied appellant's Canadian aviation subcontractor a permit to operate in the United States, unless appellant could show that American registered aircraft were not available to conduct the operation.<sup>206</sup> The appellant was unable to make such a showing and was forced to retain an American aviation subcontractor, resulting in increased costs. Appellant filed a claim for the increased costs. The Government successfully asserted the sovereign acts defense. The Board found that the increased costs were the result of a long-standing DOT policy that was not directed at appellant and

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<sup>204</sup>AGBCA No. 90-125-1, 91-2 BCA para. 23,941 (1991).

<sup>205</sup>14 C.F.R. 375.

<sup>206</sup>The policy was in response to Canada's policy of prohibiting American registered aircraft from conducting commercial operations in Canada.

constituted a sovereign act.<sup>207</sup>

Two other cases involving the issuance of permits should be mentioned. The two cases, Swinerton & Belvoir<sup>208</sup> and Hawaiian Dredging & Construction Co.,<sup>209</sup> were decided by the same board but, based upon the comments by the Board, are all but irreconcilable.<sup>210</sup> The situation in both cases involved the issuance of immigration visas for alien workers for a construction project at an American military installation on the island of Guam. In Swinerton & Belvoir, the Board interpreted the 90 day clearance clause of the contract as constituting a warranty that the visas would be granted within the 90 day period. The Government's failure to meet that 90 day deadline breached that warranty and the Government was liable, "notwithstanding that

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<sup>207</sup>Cf. Aviation Enterprises, Inc., ASBCA No. 34505, 89-1 BCA para. 21,192, (1988) (granting Government's mot. for summary judgment) aff'd, on reconsid., 89-3 BCA para. 21,995 (1989). In Aviation Enterprises, the Federal Aviation Administration's (FAA) requirement for special certification, following several accidents involving this type of aircraft, decreased the resale value of the aircraft leased to the Air Force. Appellant had originally proposed using a different type of aircraft, but pursuant to the Air Force's requirements substituted the aircraft affected by the special certification requirement. The contractor filed a claim for the difference in the resale value between the type of aircraft originally proposed and the type required by the Air Force and subsequently leased to the Air Force. The Board held that the special certification requirement was a sovereign act by the FAA and granted the Government's motion for summary judgment.

<sup>208</sup>ASBCA No. 24022, 81-1 BCA para. 15,156 (1981).

<sup>209</sup>Supra note 107.

<sup>210</sup>The Board expressly noted this fact when it stated "[w]e recognize that the conclusion which we reach here is not consistent with our earlier decision in Swinerton & Belvoir," Hawaiian Dredging, supra note 107 at 86,112.

sovereign acts and acts of third parties were involved."<sup>211</sup>

In contrast, the Board held in Hawaiian Dredging that because the 90 day clearance clause was not contained in the instant contract, no such warranty ran to the contractor. The Board noted, however, that even if the clause had been included it would not have helped the contractor. This conclusion was based upon the Board's new interpretation that the clause in question related only to the issuance of security clearances and not to the required work visas. Thus, because the interference was the result of acts by noncontracting agencies, i.e. the Department of Labor and the Immigration and Naturalization Service, the interference was a protected sovereign act.

**b. EFFECT OF SIGNIFICANT BOND BETWEEN INTERFERING AND CONTRACTING AGENCIES**

Even where two distinct agencies are apparently involved, the courts and boards may "pierce the agency veil"<sup>212</sup> to find

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<sup>211</sup> Swinerton & Belvoir, supra note 208 at 74,987 (citing Dale Construction Co. v. United States, 168 Ct. Cl. 692, 698-99 (1965); D&L Construction & Assoc. v. United States, 185 Ct. Cl. 736, 749-753 (1968); Gerhardt F. Meyne v. United States, 110 Ct. Cl. 527, 549-50 (1959)). Also see infra Section IV.

<sup>212</sup> Cf., A&B Foundry, Inc., EBCA 118-4-80, 81-1 BCA para. 15,161 (1981) (Board pierced "technical status of contracting parties to determine de facto status" regarding subcontractor's right of direct appeal). Accord, General Coating, Inc., EBCA 218-8-82, 84-1 BCA para. 17,112 (1984). This term is borrowed from the law of corporations where the courts may "pierce the corporate veil" and ignore the corporation's existence as a separate legal entity where the facts indicate that the owners of the corporation treat the corporation as an "alter ego." See for example, Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 842 F.2d 1466 (1988) (discussing factors bearing upon whether the entities are separate, including whether the entity operates independently). The absence of true independence between the contracting agency and the interfering agency underlies the

that in fact the contracting agency has played a major role in the interfering act. "Where there is a 'significant bond' between two agencies and their projects, the government will be held liable for a breach, even though it is committed by the non-contracting agency."<sup>213</sup> As seen above and as will be further examined infra, the identity of the interfering actor remains a major analytical factor.<sup>214</sup> Thus, again the search centers around whether the contracting agency or a different agency is the source of the interference.

In Weaver Construction,<sup>215</sup> the contract was with the Federal Highway Administration for the construction of a bridge in a national forest. Shortly after appellant had begun work, the Forest Service issued fire closure orders for certain days. These closure orders prevented work in the forest, unless a

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decision in J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 886 (1968) (Because of large role played by Air Force as using agency, duty to disclose imposed upon the Air Force despite the role of Corps of Engineers as separate contracting agency).

<sup>213</sup>Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 119,179, denying Government motion to dismiss (1990) (citing J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 886 (1968) and L.W. Foster Sportswear Co. v. United States, 186 Ct. Cl. 499 (1969)).

<sup>214</sup>The significance of this factor is not new. See, Stack, The Liability Of The United States For Breach Of Contract, 44 Geo. L.J. 77, (1955). At 79, the author asserted that the "factual situation in the Horowitz case is important because each fact, by its presence or absence in a particular case, has influenced the trend of subsequent decisions." Among those important facts was that "the embargo was imposed by an agency of the United States other than the contracting agency..." Id.

<sup>215</sup>Supra note 103.

waiver was issued. Appellant had been issued waivers before and after the period between September 30 and October 21, 1987. Appellant maintained that it was denied the waiver during that period for no apparent reason and sought an adjustment under the contract for the delay. The contracting officer denied the claim on the grounds that the closure was a sovereign act.

The Board observed that "[t]he essence of respondent's sovereign act defense is that the Federal Highway Administration [the contracting agency] did not perform the acts complained of."<sup>216</sup> Commenting upon this basis, the Board noted "the involvement of the contracting agency is only one element of the analysis required to determine whether the government is immune from contractual liability for the delays it causes in the performance of the contract."<sup>217</sup> In denying the Government's motion for summary judgment, based upon the sovereign acts defense, the Board opined:

Moreover, the record ... raises the inference that the Federal Highway Administration contracting officer was, indeed, involved in the determination of whether appellant was eligible for waivers from the fire closure orders. Consequently, the argument that respondent is immune from liability on the theory it owed no duty to assist appellant in obtaining waivers from the fire closure orders also fails.... [That] the acts were committed by personnel of the Forest Service rather than the Federal Highway Administration is

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<sup>216</sup> Id. at 119,183.

<sup>217</sup> Id. citing Empire Gas, supra note 94 and Goodfellow Brothers, Inc., supra note 122. The Board also noted that liability would attach, despite the presence of a sovereign act if the contractor had been "singled out for arbitrary, prejudicial treatment stemming from, or connected to, the exercise of a sovereign act." Id. See infra Section IV.

irrelevant. Where there is a "significant bond" between two agencies and their projects, the Government will be held liable for a breach, even though it is committed by the noncontracting agency.<sup>218</sup>

From all of the above, it appears that courts and boards find it significant that the interfering agency is neither the contracting agency nor has a "significant bond" with that agency. In other words, the likelihood of a Government act receiving the protection of the sovereign acts doctrine is significantly increased by a finding that the contracting agency played no role in the interfering action.<sup>219</sup> This conclusion is bolstered by the treatment accorded the sovereign acts defense when the interfering agency is also the contracting agency.

## 2. SAME AGENCY

The most significant distinction between the cases discussed above and those under this scenario is the proximity of

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<sup>218</sup>Id. at 119,183-84 (citing J.A. Jones Construction Co. v. United States v. United States, 182 Ct. Cl. 615, 626 (1968). Accord, L.W. Foster Sportswear Co. v. United States, 186 Ct. Cl. 499 (1969)). It should be noted that J.A. Jones was a duty to disclose case, but in view of the fact that the duty to disclose is one aspect of the implied obligation not to hinder, Weaver Construction, at 119,184, its application here is appropriate. See, infra, Section IV.

<sup>219</sup>See Joseph H. Beuttas, et al. v. United States, 111 Ct. Cl. 532, 77 F. Supp. 933 (1948). There the court, in overruling defendant's demurrer based on the doctrine, observed that the cases upholding Horowitz v. United States, 267 U.S. 458 (1925), involved no action by either the contracting officer or the contracting agency. Also cf., J.A. Jones Construction Co. v. United States, supra note 218 (duty to disclose imposed upon using agency in view of relationship between contracting and using agency).

the interfering actor to the contract.<sup>220</sup> As will be discussed, this distinction is even more significant when the interfering actor is the contracting officer, because he is still closer to the contract.

Because the doctrine most clearly confronts the implied duty of cooperation<sup>221</sup> in the area of contracting agency acts, most of the decisions holding the contracting agency liable for its purportedly protected sovereign acts are based upon breaches of the implied duties and obligations under the contract. In an effort to avoid redundancy, acts by the contracting agency which have been held not entitled to protection, because of a breach of an implied condition or warranty under the contract, will be addressed in Section IV infra.

This subsection will initially focus upon the acts of the contracting agency, other than acts of the contracting officer. Next, the decisions addressing the acts of the contracting officer will be examined.

**a. CONTRACTING AGENCY ACTS, NOT BY CONTRACTING OFFICER**

The cases in which acts of the contracting agency were held to be entitled to protection under the sovereign acts doctrine involve acts that are either unique to the agency or where the contracting agency serves merely as a conduit.<sup>222</sup>

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<sup>220</sup>Another distinction lies in the types of interfering acts initiated by the contracting agency. These acts tend to be local in application. See supra Section III(B).

<sup>221</sup>See infra section IV(A).

<sup>222</sup>See, e.g., Goodfellow Bros., Inc., supra note 122 at

### i. AGENCY UNIQUE ACTIONS

Where the contracting agency initiates the interfering act, or has considerable discretion regarding it, protection under the doctrine often hinges upon the nature of the interfering act. The protection afforded such acts lies largely in the fact that governmental organization has vested sole authority for such action in the agency,<sup>223</sup> which also happened

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59,641 (1977) disagreeing with Empire Gas, stating "[s]overeign acts are not transformed into contractual acts simply because the Government implements them by adopting regulations." Accord, Blake Construction Co., Inc., GSBCA No. 4118, 75-1 BCA para. 11,278 (1975). Also see, Carter Construction Co., Inc., supra note 119 at 113,028 (action of contracting officer pursuant to agency regulations promulgated to implement sovereign act are protected sovereign act).

<sup>223</sup>While generally difficult to classify by type of interference, some of the cases can be so classified. For example, fire closure orders, issued by National Forest Service, preventing access to the work site to perform contract with Forest Service, held to be a sovereign act: Gary Hegler, supra note 151; Lloyd H. Kessler, Inc., supra note 97; Goodfellow Bros., Inc., supra note 122; L.S. Matusek, supra note 151 (appeal granted in part based upon contract language limiting risk assumed by contractor to "short periods"); James Farina Corp., supra note 151. Other acts by the contracting agency interfering with performance include: (1) operation of flood control dams: Amino Brothers Co., 178 Ct. Cl. 515, 372 F.2d 485, cert. denied, 389 U.S. 846 (1967); Constructors-PAMCO, ENG BCA No. 3468, 76-2 BCA para. 11,950 (1976) (operation of flood control was sovereign act but forcing contractor to work through conditions created by such operation was not); Shutt Construction Co., ENG C&A Bd Decision No. 792, 1955 ENG BCA LEXIS 174 (November 30, 1955); (2) imposition of security regulations, in warlike environment which rendered performance more difficult: Woo Lim Construction Co., Ltd., ASBCA No. 13887, 70-2 BCA para. 8,451 (1970); E.V. Lane Corp., ASBCA Nos. 9741, 9920 and 9933, 65-2 BCA para. 5,076 (1965) (appeal granted in part on other grounds) aff'd on reconsid., 66-1 BCA para. 5,472 (1966); (3) raising of military messing rates, Bared International Co., Inc., ASBCA No. 30,048, 88-1 BCA para. 20,378 (1987), aff'd on reconsid., 88-3 BCA para. 21,139 (1988); and, (4) military per diem rates by the contracting agency, Aden Music Co., ASBCA No. 28,225, 87-3 BCA para. 20,113 (1987).

to be the contracting agency.<sup>224</sup> In cases where the act is not truly unique to the agency's function application of the doctrine becomes problematic.<sup>225</sup> Actions by the contracting agency, which are unique to that agency present special analytical problems. One source of this problem is that this basis of affording protection for contracting agency acts is difficult to reconcile with the contracting agency's duties under the contract.<sup>226</sup> Perhaps the most glaring example of an interfering act initiated by the contracting agency that was held to be entitled to protection under the doctrine is found in Air Terminal Services, Inc. v. United States.<sup>227</sup>

In Air Terminal Services, the plaintiff was awarded a contract to operate the paid parking lot at Washington National Airport. In announcing its invitation for bids (IFB), the Government published a data sheet showing its gross parking receipts for the previous year and the number of passengers

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<sup>224</sup>See supra Section II(B)(1), discussing the fact that one of the purposes of the sovereign acts doctrine is to insure that the agency with the authority to act is not prevented from acting because of its contractual commitments.

<sup>225</sup>Compare, Winston Brothers, supra note 190 with C.H. Leavell, supra note 202 (regarding the allocation of insufficient funds appropriated to fully fund the agency's contracts).

<sup>226</sup>See infra Section IV(A). Also see Beuttas v. United States, 111 Ct. Cl 532, 537, 77 F.Supp. 933, \_\_\_ (1948) where the court, overruling the defendant's demurrer, pointed out "[a]nother distinguishing feature between the present case and the cases upholding the Horowitz doctrine is that ... in the present case it was the very department of the Government that entered into the contracts with plaintiffs that..." initiated the interfering action.

<sup>227</sup>Supra note 175.

passing through the airport. It also disclosed its projection for the number of passengers using the airport during the next year. This projection reflected a substantial increase. At the time of award there were sixty-two parking meters at the airport and an on-going study was investigating the feasibility of installing additional metered parking spaces. The contractor was not informed of the latter fact. The airport, under the control of the Civil Aeronautics Administration, had published in the Federal Register regulations reflecting its authority to designate additional metered parking spaces on the streets of the airport. Subsequent to award, the Agency installed 122 additional metered parking spaces at the airport. The effect was to substantially reduce the income, and ultimately to cause a financial loss, to the contractor from operation of the paid parking lots. The contractor filed a claim for the loss.<sup>228</sup> The Government defended, inter alia, on the basis of the sovereign acts doctrine.

The court, with Chief Judge Jones dissenting, held for the Government.<sup>229</sup> The majority concluded that the installation of

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<sup>228</sup>The basis for the claim was the government's breach of warranty not to hinder performance. See, infra Section IV. The majority of the court, not accepting plaintiff's theory, addressed the issue in terms of a duty to disclose and found sufficient disclosure effected through publication in the Federal Register of the Agency's authority to regulate traffic and parking. In his dissent, Chief Judge Jones opined that the information provided to the contractor, which obviously induced his performance, in fairness required additional disclosure. See infra Section IV.

<sup>229</sup>The majority found that there had been disclosure of at least the authority to act as it did. Thus, the contractor

the additional parking meters was a sovereign act pursuant to the Agency's police powers to regulate traffic. This result, under these facts, clearly vitiates any semblance of fairness.

As Chief Judge Jones opined in his dissent:

Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences.<sup>230</sup>

From the opinion in Air Terminal Services, which has not been overruled, it is evident that the element proffered by the United States District Court for the District of Columbia in Port Arthur Towing, that the contracting agency not be the motivating agency behind the interfering act,<sup>231</sup> is not dispositive<sup>232</sup> of the existence of a protected sovereign act.

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should have been on notice of the possibility. The cases citing Air Terminal Services concentrate upon this aspect of the decision, i.e. when the Government publishes regulations showing its authority in a certain area the contractor is charged with knowledge that an act pursuant to this authority is foreseeable. See, e.g., Pacific Architects & Engineers, Inc., ASBCA Nos. 16095, 17073, 17088, and 17190, 74-2 BCA para. 10,755 (1974). Also see infra Section IV(A) for a discussion of the duty to disclose.

<sup>230</sup>165 Ct. Cl. at 540 (Jones, C.J., dissenting) (quoting Judge Learned Hand in Heil v. United States, 273 Fed. 729, 731).

<sup>231</sup>See supra note 174 and accompanying text.

<sup>232</sup>The situations in which this factor has primary, and often

The analytical problems associated with this type of interfering act by the contracting agency are also the subject of apparently conflicting decisions. This ostensible conflict may be resolved by focussing upon the nature of the interfering act. An example of this is seen by comparing United States v. Peck<sup>233</sup> and Wilson v. United States.<sup>234</sup> Both cases involved contracts with the Quartermaster-General to provide supplies to the military. In both cases performance was rendered either impossible or more difficult by the acts of individuals within the contracting agency. The difference between the two cases lies in the type of interfering act. In Peck the doctrine did not shield the Government; in Wilson it did.

In Peck,<sup>235</sup> the Army entered into a contract, at St. Paul, with the appellee to provide hay to a military garrison and to clear some timber from the garrison. Because of the "infrequency" of communications between the Quartermaster-General, located at St. Paul, and his deputy, located at "a distant

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dispositive influence, occurs when the Government has violated its implied obligations under the contract. See, infra Section IV.

<sup>233</sup>102 U.S. 46 (1880). Arguably, the acts of the Quartermaster-General and his deputy both constituted acts of the contracting officer. See infra Section III(C)(2)(a). Because there were two government agents with authority to affect the contract and because of the other facts associated with this case it is addressed in this subsection because it is more analogous to the acts of the contracting agency than the traditional interfering acts of the contracting officer.

<sup>234</sup>11 Ct. Cl. 513 (1875).

<sup>235</sup>Supra note 233.

post," a second contract, entered into at the garrison, was awarded for providing hay to the garrison. There was only one source of hay within the region. The second contractor arrived at the source of hay first and prevented Peck from fulfilling his contract. The contracting officer withheld the price of the hay contract from the amount due to Peck for clearing the timber, maintaining that Peck's failure to perform the hay contract constituted a default. In affirming the Claims Court voiding of the termination for default of Peck, the Supreme Court acknowledged that providing the hay was a military necessity and that the confusion producing the second contract was the result of the distance and infrequency of communications between the Quartermaster-General and his deputy. Thus, despite the absence of fault by the agency, the Court held "... an innocent contractor should not be made to suffer for these contingencies. If by their occurrence the defendant's themselves, through their agents, rendered it impossible for the claimant to perform his engagement, he ought not to be visited with the penalty of nonperformance."<sup>236</sup>

In Wilson, the Quartermaster-General entered into a contract with the plaintiff to provide 500 mules to the Army to be delivered to Washington D.C. The Civil War was in progress and because of the proximity of Confederate troops to the city, the military governor of the city issued an order prohibiting

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<sup>236</sup>Id. at 47. While this case was decided upon the issue of impossibility, the rationale underlying the holding is based upon the duty to cooperate owed between parties to a contract.

civilians from entering the city without a pass. Upon arriving at the city, the claimant and his mules were denied entry because Wilson did not have the necessary permit. During the night the mules were taken by Confederate troops. Wilson was forced to acquire more mules to satisfy the contract. Wilson filed a claim to recover the costs of purchasing the replacement mules. The order of the military governor was held to be a sovereign act and the suit was dismissed.

One distinction that can be made between these cases is that in Peck the interfering act was the product of the same organization. Thus, the interfering actors were more "closely related" in Peck than in Wilson, where the interfering act was the product of a different organization within the same agency.<sup>237</sup> In Wilson the Quartermaster-General, at least in theory, was subordinate to the military governor, who also had authority over the guards who prevented Wilson's entry into the city. This situation is analogous to the superior subordinate relationship between the Quartermaster-General and his deputy in Peck.

Another distinction, which has received little attention, is the difference between the nature of the acts. In Wilson, there can be little question that the act was pursuant to the Government's need to physically protect itself to insure its continued

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<sup>237</sup>The validity of this distinction is subject to challenge in view of the "chain of command" structure of all military organizations.

existence.<sup>238</sup> In contrast, the situation in Peck, merely represented a situation where the Government contracted, as would anyone, for provisions for its animals. Considered in this light, the cases are reconcilable.<sup>239</sup>

### ii. CONTRACTING AGENCY AS A CONDUIT

With some exceptions,<sup>240</sup> when the contracting agency acts merely as a conduit for a decision by someone outside of the contracting agency, the act will be held to be a protected sov-

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<sup>238</sup>See, discussion supra at note 175 and infra at notes 273-74 regarding the general failure to acknowledge, or with any consistency address, this type of distinction regarding the sovereign acts of the Government under the sovereign acts doctrine.

<sup>239</sup>A third possible distinction between the cases lies in the public and general application of the interfering acts involved in the cases. The order in Wilson prevented the entry by all civilians without the necessary pass, thus any affect on Wilson was arguably indirect. In contrast, the interfering act in Peck affected no one except those involved in the contract. From this, it is arguable that the order in Wilson was public and general while the interfering act in Peck was not. See supra Section III(B). Arguably any of the three distinctions suffice to reconcile the different outcomes under ostensibly similar facts, but the different character of the two acts and their importance to the sovereign serve as examples of the role that the nature of the act plays, expressly or otherwise, in resolving the conflict between contracting agency's implied duties and the needs of the sovereign that interfere with those duties. Cf. Freedman v. United States, 162 Ct. Cl. 390, 320 F.2d 359 (1963) (Presence of a "pecuniary drawback" for Government is "poor reason to break an outstanding promise" to a contractor).

<sup>240</sup>For example, in Empire Gas, supra note 94, the Board opined that irrespective of the ultimate source of the direction, if that direction was implemented by the contracting officer that constituted "almost conclusive proof" that the act was not a sovereign act. But see Goodfellow Bros., Inc., supra note 122 (refusing to adopt such a position).

ereign act.<sup>241</sup> The underlying rationale here appears to be that the contracting agency merely implements the decision of a different agency and therefore was not truly the interfering actor.<sup>242</sup> The emphasis in this area is upon the discretion vested in the contracting agency.<sup>243</sup>

In Port Arthur Towing Co.<sup>244</sup> the court addressed the issue when the contractor claimed the interfering agency was the contracting agency. The contractor's rationale was based upon the fact that the Competition in Contracting Act gave the contracting agency the authority to not stay performance of the contract.<sup>245</sup> In finding that the interfering agency was not the

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<sup>241</sup>See Hills Materials Co., supra note 130. Also see Port Arthur Towing Co., supra note 169, where the court set forth that one of the criterion for application of the sovereign acts doctrine is that the contracting agency not be the motivating actor behind the interference. Again see Blake Construction Co., GSBC<sup>1</sup> No. 4118, 75-1 BCA para 11,278 (1975) (Implementation of Economic Stabilization Act of 1975 by contracting agency regulation did not transform the interfering act into a contracting agency act); Paramount Cleaners, ASBCA No. 15508, 73-2 BCA para. 10,181 (1973) (Increase in minimum wage to be paid under concession contract was mandated by Service Contract Act of 1965 and implemented by Department of Defense for appellant's contract).

<sup>242</sup>See supra Section II(A)(1) for a discussion regarding the "dual capacity" of the Government, which this rationale employs.

<sup>243</sup> See, e.g., DWS, Inc., ASBCA No. 33245, 87-3 BCA para. 19,960, appeal denied on other grounds (1987). The analysis employed is exactly the same as that discussed above where the act is claimed to be that of a different agency. Simply put, these issues are different sides of the same "who is the interfering actor" coin.

<sup>244</sup>Supra note 169.

<sup>245</sup>See supra text accompanying notes 170 through 173 regarding the facts surrounding the imposition of the stay, under the Competition in Contracting Act, following a contract

contracting agency, the court concluded that the contracting agency had "practically" no discretion in imposing the stay. Under those findings, there was little question that the contracting agency was merely a conduit.<sup>246</sup>

#### **b. ACTS BY CONTRACTING OFFICER**

If the contracting agency is closer to the contract than is a different interfering agency, then the contracting officer is still closer.<sup>247</sup> Nevertheless, as with the contracting agency, the contracting officer may act either independently or as a conduit.

##### **i. INDEPENDENT ACTS OF THE CONTRACTING OFFICER**

When the contracting officer is not acting as a conduit for higher authority,<sup>248</sup> his acts have the greatest likelihood of

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award protest.

<sup>246</sup>Compare, Inman & Associates, ASBCA Nos. 37869, 37928, 38185, and 38186, 91-3 BCA para. 24,048 (1991) (appeal granted in part). There the Board, based upon failure to show that the action was requested by (let alone mandated by) the EPA, held that the Navy, the contracting agency, was the interfering actor and therefore the Government was held liable for the damages suffered by the contractor as a result of the interfering act.

<sup>247</sup>The effect of this close proximity is often seen in the action being found to be not public and general or is directed at the contract or contractor. The cases where the action was expressly held to not be "public and general" are discussed supra in Section III(B). The cases discussed in this section are those which emphasize the role of the contracting officer.

<sup>248</sup>Where the contracting officer acts pursuant to contracting agency regulations, his acts are those of an agent of the contracting agency and should be evaluated under those standards. See, e.g., Carter Construction Co., supra note 119. But see, Empire Gas, supra note 94 and its progeny discussed infra at note 252, which appear to apply a presumption that acts of the contracting officer are contractual acts and therefore not entitled to protection under the sovereign acts doctrine.

not qualifying for protection under the doctrine. Under this situation, his proximity to the contract has resulted in at least one Board opining:

The fact that the suspension of work order was in writing addressed to the contractor by name, referring to the contract by number, and signed by the contracting officer by name is almost conclusive proof that such an order was (1) an act of the Government in its contractual capacity and (2) issued in exercise of the Government's right ... under the contract.<sup>249</sup>

It is the facts of Empire Gas that give rise to the questions about the decision and logically create the basis for inconsistency.<sup>250</sup> There, the contracting officer informed the contractor, pursuant to the direction of the base commander, that because the base had been placed on alert, no further work on the taxiways could be performed until further notice. The contractor filed a claim seeking his costs associated with the suspension of work involving the taxiways. Despite the fact that the contracting officer merely implemented the directions of his superior commanders, the Board rejected the argument and held as set forth above.

This position has been rejected by other boards<sup>251</sup> and, to a certain degree, undermined by the Armed Services Board of Contract Appeals itself in Nero and Associates, Inc.<sup>252</sup> There

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<sup>249</sup>Empire Gas Engineering Co., supra note 94 at 17,128 (emphasis added).

<sup>250</sup>The facts are set out supra in the text following footnote 145.

<sup>251</sup>See cases cited supra note 222.

<sup>252</sup>Supra note 96. But see, Federal Electric Corp., ASBCA No.

the ASBCA opined that if the actions of the commander, who was also the contracting officer for purposes of the contract in issue, had complied with the Agency's regulations, then the interfering act would have been a protected sovereign act.

The role of the contracting officer may be omnipotent for purposes of the contract, but his authority is considerably more limited where the implementation of directions from higher authority is involved. To presume that all actions of the contracting officer which affect the contract are somehow acts of the Government in its contractual capacity stretches reason beyond recognition.<sup>253</sup> The result in Empire Gas reflects the

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20490, 76-2 BCA para. 12,035 (1976) (contracting officer's denial of access to air traffic control tower during visit of foreign heads of state was a contractual act, pursuant to delay of work clause rather than a sovereign act); Philco-Ford Corp., ASBCA No. 14623, 72-1 BCA para. 9,390 (1972) ("In Empire Gas... the Board decided flatly that an order suspending work was compensable when issued by a contracting officer although based solely upon the command of a superior officer, concededly acting in a sovereign capacity"). Federal Electric is distinguishable from Empire Gas in that, unlike Empire Gas, no alert status was declared for the installation, let alone the specific area of the control tower. Also see, Lane Construction Corp., ENGBCA No. 1977, 1961 ENGBCA LEXIS 142 (September 1961) where payment was denied based upon the sovereign acts doctrine until it reached the Comptroller General who allowed payment under the authority of Empire Gas, Comp. Gen. Dec. B-15383, unpublished (June 17, 1964).

<sup>253</sup>The contracting officer represents the only official contact with the installation or work place and as such is the logical conduit for information affecting the contractor. If this dual capacity of the contracting officer is ignored, the question becomes how is the contractor to be informed and what weight is the contractor to give the notifying official if the contractor believes that the act will affect the contract. These are practical considerations that should not be overlooked by courts and boards. If ignored, the Government may find itself perfectly legal but getting absolutely nothing accomplished. Cf. Miller, supra note 159 at 14 (Jones, C.J.

undue primacy of the application of the public and general and direct impact elements of the doctrine at the expense of common sense. It is fortunate for procurement jurisprudence that such results are anomalous.

### ii. THE CONTRACTING OFFICER AS A CONDUIT

In contrast to the independent acts by the contracting officer, where the contracting officer acts merely as a conduit for higher authority, and the act is otherwise a protected sovereign act, that protection generally will not be lost.<sup>254</sup> The role of the contracting officer must be analyzed, however, to ascertain if he is performing a discretionary act or merely acting as a contracting agency conduit for decisions implemented by a different and authorized agency.<sup>255</sup> Such analysis was clearly employed in Inman & Associates, Inc.<sup>256</sup>

In Inman, the contractor, in performing a Navy contract to replace an electrical system switching station at Corpus Christi Naval Air Station, intentionally dropped transformers to the

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dissenting) ("there are some things that go beyond the forms of law").

<sup>254</sup>See, e.g., Carter Construction Co., supra note 119 at 113,028 (action of contracting officer pursuant to agency regulations promulgated to implement sovereign act are protected sovereign act). Also see Clemmer Construction Co. v. United States, 108 Ct. Cl. 718, 71 F.Supp. 917 (1947) (Executive Order directing all agencies to set minimum work week of 48 hours for government contracts held to be sovereign act which agency merely implemented). But see, Empire Gas, supra note 94 and its progeny cited supra at note 252.

<sup>255</sup>This requirement is clearly seen in DWS, Inc. supra note 101 and Port Arthur Towing Co., supra note 169.

<sup>256</sup>supra note 246.

ground which resulted in PCB's being spilled on the ground. In performing the clean-up of the contaminated earth, the contractor loaded the earth onto a trailer that it had rented. The trailer was rented on a daily basis and was to be used to transport the contaminated earth to a location for proper disposal. When the contractor attempted to remove the loaded trailer from the work site it was refused the necessary permission by base contracting personnel.

The contracting personnel had been instructed by the Naval Investigative Service (NIS) to keep the trailer on the base until further instructions were received from the Environmental Protection Agency (EPA). The EPA, evidently, intended to take samples from the soil in furtherance of a criminal investigation pertaining to the spill. The contractor filed a claim for the increased rental costs incurred for the period in which it was prohibited from removing the trailer from the base.

The Government asserted the sovereign acts defense. The Board sustained the contractor's claim finding, at 120,368:

The removal of the trailer was not prevented by the EPA acting pursuant to its statutory investigative authority, but by the Navy, the contracting agency. There is no evidence that the Navy's role was passive, and that it was merely acting pursuant to explicit directions of the enforcement agency.

Thus, anticipation of what the authorized agency could or should require is insufficient. In the absence of explicit direction from the authorized agency or higher authority, the act will be reviewed as an independent act of the contracting officer.

#### D. ACT PERFORMED IN THE NATIONAL INTEREST

While the element mandating that the act be public and general in application addresses the scope required for an act to be entitled to protection under the doctrine, the requirement that the act be in furtherance of a national interest relates to the purpose to be achieved by the act. Under most articulations of the elements,<sup>257</sup> and in all cases deciding the issue, an act must be in the national interest in order to qualify for protection under the doctrine. At the same time, however, the existence of an important national purpose alone is insufficient to warrant protection under the doctrine.<sup>258</sup> From the absence of analysis surrounding the courts and boards examinations of it, the presence of this element appears to be largely intuitive.<sup>259</sup> The absence of this element appears to be equally intuitive.<sup>260</sup>

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<sup>257</sup> See for example, supra notes 90 through 92 and accompanying text.

<sup>258</sup> Everett Plywood, supra note 97.

<sup>259</sup> See for example, Broadmoor Corp., supra note 89, at 108,026, where the board summarily concluded, "[t]he actions by the EPA and the court were clearly sovereign acts." Also see Tony Downs Foods Co., supra, note \_\_\_, 209 Ct. Cl. at 36 (the Executive Orders were "unquestionably promulgated for the general good,"; Granite Construction Co., supra note 190, at 45,584 (unchallenged defense assertion that the Presidential impoundment of funds was unquestionably an act for the "general good"). The exception to such summary disposition of this element occurs where there is some statutory for the act. See for example, Borg-Warner Corp. v. United States, 117 Ct. Cl. 1,28 (1950) (classification of plans submitted by plaintiff was effected pursuant to the Espionage Act, 40 Stat. 217).

<sup>260</sup> See, e.g. American Ensign Van Service, et al. v. United States, 220 Ct. Cl. 681, 683 ordering judgment for plaintiff (1979). There, the court noted "[n]o case has been brought to our attention that would warrant classifying as a sovereign act

There are various limitations upon basing a sovereign acts defense upon the importance of the specific act.<sup>261</sup> The most significant of these is that "high reasons of public policy do not endow public officials with authority to repudiate contracts."<sup>262</sup> Several brief examples from the United States Supreme Court will highlight the significance of this limitation.

In United States v. Lynch,<sup>263</sup> Congress had attempted to "save the solvency of the government in the great depression" by reducing government payments by 10%. Congress passed the Economy Act of March 20, 1933 purporting to repeal, inter alia,

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the closing of a military ocean terminal purely to effect cost savings." Also see Freedman v. United States, supra note 239, 162 Ct. Cl. at 402 (Government's desire to save money was insufficient reason to break an "outstanding promise" to the contractor, citing Lynch v. United States, 292 U.S. 571, 580 (1934)). Most recently in Hughes Communications Galaxy, Inc. v. United States, \_\_\_ Ct. \_\_\_, No. 91-1032C, slip op. at 25 (April 13, 1992), the Claims Court opined "[a]cts that are motivated primarily by a desire to save money do not provide a defense" under the sovereign acts doctrine. The significance of this conclusion should not be underestimated in the present environment of diminishing federal budgets and cut-backs.

<sup>261</sup>Amongst those limitations are that the act in question must be legal, and cannot be an arbitrary or capricious act on the part of the agency. See, Ottinger v. United States, 116 Ct. Cl. 282, 285, 88 F. Supp. 881, 883 (1950); O'Neill v. United States, 231 Ct. Cl. 823 (1982). These limitations are discussed infra in Section IV(E).

<sup>262</sup>Everett Plywood, supra note 97, 227 Ct. Cl. 422. Admittedly, the mandatory presence of the termination for convenience clause in government contracts militates against this reason ever being examined. In Everett Plywood, the termination clause provided for termination under some circumstances, none of which were presented by the facts.

<sup>263</sup>Supra note 260.

"all laws granting or pertaining to yearly renewable term insurance." The effect of the law was to reduce the value petitioner received under his Government insurance. The Court held that such an action was a repudiation of a contract and constituted a taking under the Fifth Amendment.<sup>264</sup>

Similar analysis was employed and results obtained in Perry v. United States<sup>265</sup> and Bethlehem Steel Co. v. United States.<sup>266</sup> In the former case, the Government, in its effort to change the basis of United States currency, had repudiated the gold repayment provision in certain Government issued bonds. In the latter case, the Government determined that certain ship builders had received "unconscionable" profits and therefore the Government was not bound to the contracts. In both cases the Court determined that the acts of the Government constituted "takings" under the Fifth Amendment to the United States Constitution. In each of these cases there can be little doubt of the importance of the national policy to be fulfilled through the actions of Congress. Yet in each case, the authority was

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<sup>264</sup>The significance of this decision by the Court lies in the fact that the "taking" analysis is often concomitant with breach analysis in cases involving acts of the Government which interfere with the contractor's property rights in the contract. See Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943). Also see, Latham, supra note 177 at 53, where the author asserts "conduct which amounts to a taking also constitutes a compensable sovereign act." See infra Section V(A).

<sup>265</sup>294 U.S. 330 (1935) (In attempting to change the basis of United States currency Congress repudiated all payment in gold. Court held that Congress lacked the authority to do so without providing just compensation).

<sup>266</sup>315 U.S. 289 (1942).

limited by the contractual rights of the individual.<sup>267</sup> Thus, more than an important national purpose must be present before protection will be provided to a sovereign act.

As discussed in the sections above, there has been no limit to the types of acts that have qualified for protection under the doctrine.<sup>268</sup> The protected acts range from the protection of the environment<sup>269</sup> to controlling inflation<sup>270</sup> to priority resource allocation systems.<sup>271</sup> At the same time, there can be little question that the purposes to be served in Lynch, Perry, and Bethlehem Steel were as important as the interests at stake in the above referenced cases finding the acts in question protected sovereign acts. The reconciliation of these results lies in the requirement that the purported sovereign act must possess not only the national interest necessary to justify the act, it must also be a public and general act.<sup>272</sup> If both of

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<sup>267</sup>Ostensibly, cases like Perry appear to undermine the validity of the analytical approach emphasizing the effect on all persons similarly situated to the contractor. The reason that the cases do not have such an effect lies in the difference in the nature of the "property" involved in the Perry-type cases and the "property" involved in most sovereign acts doctrine cases. See infra Section V(A).

<sup>268</sup>See supra Sections III(A), (B), and (C) and cases cited therein.

<sup>269</sup>See, e.g., Hedstrom Lumber, supra note 93.

<sup>270</sup>See, e.g., Carter Construction Co., supra note 119.

<sup>271</sup>See, e.g., Aragona Construction Co. supra note 186.

<sup>272</sup>Given the nature of the legislation involved in Lynch, Perry, and Bethlehem Steel, there can be little disagreement that the acts were directed at either the plaintiffs or their contracts. Based upon this fact alone, the acts would not qual-

these elements are present the identity of the interfering actor becomes significant. While this last consideration may not be dispositive, it carries significant weight where the interfering act by the Government violates an implied or express obligation under the contract.

#### **E. GENERAL COMMENT ON THE "ELEMENTS"**

As the above indicates, the decisions in this area focus largely upon the identity of the interfering agency and the scope of the interfering act. One consideration which is generally ignored in the case law,<sup>273</sup> lies in the nature of the

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ify as protected sovereign acts. See Winstar Corp. v. United States, \_\_\_ Cl. Ct. \_\_\_, 1992 U.S. Cl. Ct. Lexis 135 (April 21, 1992) (Because the Government's purpose in enacting the legislation was to take away plaintiff's right to use of "supervisory goodwill," the sovereign acts doctrine was not applicable).

<sup>273</sup>The distinction has been addressed, at least tangentially, in responding to the Government's assertion of the sovereign acts defense where the activity of the government was simply daily government operations. See, Jacobsen Construction Co., ENG BCA No. 1551, 1961 Eng. BCA LEXIS 116 (December 1961) where the contractor filed a claim because the Air Force's location of a jet engine test stand produced such noise as to render performance of the construction contract more difficult and hence more costly. The Board, in sustaining the appeal on reconsideration, noted that a "showing that the activity had a sound legal basis and authorization" does not sustain a claim that it was an act of the government in its sovereign capacity. The Board opined that there must be some specific exercise of sovereignty which affects the contract by operation of law for the doctrine to apply. Under the facts of Jacobsen, the board concluded that the government acted analogously to an owner of land under a private contract. Also see, R&R Enterprises, IBCA No. 2417, 89-2 BCA para. 21,708 (1989) where the Board, at 109,148, citing United States v. Oklahoma Gas & Electric Co., 297 F. 575 (1924), observed that construction by a government agency that interfered with the performance of a concessioner's contract, was not a sovereign act because the Government was performing an ordinary act not relating to or involving its existence.

interfering act.<sup>74</sup> Sovereigns must perform certain acts which are necessary to their continued existence. Arguably the wider the application and the greater the national purpose to be served by the interfering act the more likely it is that the act is of this nature. However, such indicia should not be dispositive. The Government is capable of effectuating many acts that are applied nation-wide and serve a purported national interest which are not necessary to its continued existence nor to its ability to effectively govern. All such acts, despite their purpose and application, should not be deemed protected acts. Perhaps it is the failure or inability to identify which types of acts are necessary to govern efficaciously that renders

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<sup>74</sup>As with all generalizations, there are exceptions to this one. The area of national security, as seen in both the classification of information and valid military orders, are largely decided, expressly or impliedly, based upon the nature of the sovereign act. See, e.g., Borg-Warner Corp. v. United States, 117 Ct. Cl. 1, 89 F. Supp. 1013 (1950) (classification of designs prevented commercial exploitation of equipment); Wilson v. United States, supra note 234 (Imposition of pass requirements for civilians to enter Washington D.C. during Civil War); Jones v. United States, 1 Ct. Cl. 383 (1865) (military orders withdrawing troops from "Indian territory"). Cf., Hughes Communications Galaxy, Inc. v. United States, supra note 260 (breach of launch services agreement by NASA, pursuant to direction of President after explosion of "Challenger," constituted a sovereign act for which NASA was not liable). A word of caution is in order regarding the Hughes decision, despite an extended discussion of the sovereign acts doctrine, the case was decided based upon the presence of a contract clause that placed the contractor on notice of the possibility of changes beyond NASA's control. Thus, the decision was based upon an assumption of risk and the discussion regarding the sovereign acts doctrine may be little more than dicta.

recourse to the elements of the doctrine a necessity.<sup>275</sup> In any event, it is the often mechanical recourse<sup>276</sup> to the elements, without examining the character of the act, that produces the confusion and inequity that occasionally surfaces in the likes of Air Terminal Services and Port Arthur Towing.

#### IV. FACTORS AFFECTING PROTECTION UNDER THE DOCTRINE

Even if the elements are extant, the courts and boards may nevertheless hold the Government responsible for the injury caused by its sovereign acts in certain situations. Such results have been obtained when: (1) the Government failed to fulfill one its obligations under the contract; (2) a contract clause provided for recovery under the situation; (3) the Government made an express or implied promise to compensate the contractor for such an eventuality; (4) the act in question was not the proximate cause of the injury; (5) the act was "illegal"; or finally, (6) there existed an alternate course of action which would not have affected the Government's contract obligations. Each of these situations is discussed below.

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<sup>275</sup>See supra note 108 for a discussion regarding the difficulty inherent in this process. With expanding government it becomes more and more difficult to distinguish those acts which are properly sovereign and those which have allegedly attained that status as a result of the Government's assumption of prior private responsibilities.

<sup>276</sup>The Court of Claims has opined that the "guidelines for determining the existence of a sovereign act 'are not susceptible to mechanical application'" Hedstrom Lumber, 7 Cl. Ct. 16, 25 (1984) (quoting Wah Chang Corp., 151 Ct. Cl. 41, 51, 282 F.2d 728, 735 (1960)). Nevertheless, the failure to expressly consider the nature of the act indicates an unnecessary avoidance of the real issue. If such acts must be identified on a case by case basis nothing is lost in considering the character of the particular act in question.

## **A. CONTRACTUAL OBLIGATIONS**

As referenced earlier, contracts between private parties carry implied obligations of good faith and fair dealing, which render the interfering party liable for damages resulting from its failure to fulfill these obligations.<sup>277</sup> Under certain circumstances the Government bears identical obligations.<sup>278</sup> Two preliminary questions must be resolved before turning to the substance of the obligations: what are the obligations; and, to whom do they apply.

### **1. IDENTITY OF THE IMPLIED OBLIGATIONS**

The Government's obligations or warranties to its contractors have been summarized to be the following:

1. Implied warranty of the adequacy of the specifications.
2. Implied warranty of the duty to disclose superior knowledge.
3. Implied warranty to act with reasonable diligence.
4. Implied warranty not to hinder the performance of the other party.<sup>279</sup>

While the first obligation is resolved without relation to

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<sup>277</sup>See supra note 4. Included in these obligations are requirements that the parties do nothing to hinder, increase the cost of, or prevent performance.

<sup>278</sup>While not usually encountered in the sovereign acts area, the contractor owes similar duties to the Government. See, All-American Poly Corp., GSBCA No. 7104, 84-3 BCA para. 17682 (1984) (deliberate inaction by contractor precluded contract reformation). Accord, J.C. Manufacturing, Inc., ASBCA No. 34399, 87-3 BCA para. 20137 (1987). This mutual obligation comports with the obligations set forth in Restatement, Contracts 2d, (hereinafter Restatement) sec. 205 (1981).

<sup>279</sup>R&R Enterprises, IBCA No. 2417, 89-2 BCA para. 21,708 at 109,153 (1989). Accord, Johnson & Son Erectors, ASBCA No. 24564, 81-1 BCA para. 15,082 at 74,599 (1981).

the sovereign acts doctrine,<sup>280</sup> the latter three are often raised by the contractor in response to the Government's assertion of the sovereign acts defense. A further refinement to these generally stated duties is that the latter two are really facets of a single duty to cooperate.<sup>281</sup> Thus, in a sovereign acts scenario the Government has two generally implied duties: (1) the duty to disclose superior knowledge; and, (2) the duty to cooperate.

## 2. IMPLIED ONLY AGAINST THE CONTRACTING AGENCY

The obligations are clearly applicable to government contracts, but they are owed to the contractor only by the contracting agency. This conclusion results from a reconciliation of two apparently conflicting principles. First, "[w]ithin the rule that prevention of performance by the other [contracting] party constitutes a breach of the contract there has been carved out the exception or qualification 'that the United States as a contractor cannot be held liable directly or indirectly for the

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<sup>280</sup>The source of this warranty is United States v. Sperin, 248 U.S. 132 (1918). See Maecon, Inc., ASBCA No. 31081, 89-2 BCA para. 21,855 (1989). Also see, e.g., Wakenhut Corp., IBCA No. 2311, 91-1 BCA para. 23,318 (1990) (The Government's implied warranty of the adequacy of its specifications is based upon the Government's responsibility for the specifications, not upon nondisclosure of superior knowledge).

<sup>281</sup>See, e.g., Restatement 2d sec. 205 (1981) where the duties are dealt with under the label of "Duty of Good Faith and Fair Dealing." Also see Speidel, Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts, 51 Geo. L.J. 516, (1963), where the author addresses these implied duties as different manifestations of the implied duty to cooperate.

public acts of the United States as a sovereign'."<sup>282</sup> Second, notwithstanding this "exception or qualification," "[t]he United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."<sup>283</sup> While this language reflects that the obligations will be implied "against the Government," the case law indicates that such obligations are implied only against the contracting agency.<sup>284</sup>

Because the sovereign acts doctrine is an "equitable doctrine,"<sup>285</sup> the apparent contradiction following from appli-

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<sup>282</sup>Wah Chang Corporation v. United States, 151 Ct. Cl. 41, 50, 282 F.2d 728, \_\_\_ (1961) (emphasis supplied by court) (quoting Jones v. United States, 1 Ct. Cl. 383, 385 (1865)).

<sup>283</sup>United States v. Bostwick, 94 U.S. 65 (1877). Accord R&R Enterprises, supra note 279; Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959); George A. Fuller Co. v. United States, 108 Ct. Cl. 70 (1947). Also see, United States v. Smith, 94 U.S. 214, 218 (1876) where the Court opined that if conduct between private contracting parties "would be considered an improper interference, and damages would be awarded to the extent of the loss...the United States must answer to the same rule."

<sup>284</sup>See, e.g., George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947) (implied condition of every contract, including government contracts, that neither party to the contract will do anything to hinder other party's performance); Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1965). Also see, Joseph A. Beuttas v. United States, 111 Ct. Cl. 532, 77 F. Supp. 933 (1948) (the court distinguished between the treatment accorded interfering acts by the contracting agency and those by different agencies).

<sup>285</sup>Weaver Construction Co., DOT BCA No. 2034, 91-1 BCA para. 23,800 at 119,182 (1990) (denying Government motion to dismiss). While the Board was discussing the principle that contractors with government contracts should occupy no better position, vis-a-vis a sovereign act, than contractors whose contract was not with the Government, the converse of this situation should also

cation of the above rules may be resolved by focusing upon whether the interfering actor was a party to the contract.<sup>286</sup> This approach permits the acts of a noncontracting party, that otherwise qualify for protection, to retain that protection. At the same time, the implied obligations concomitant with freely entering commerce are implied against the governmental contracting party. As with most efforts at reconciliation in this area, however, even this analytical approach will not necessarily provide uniform results. Thus, simply because the

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be true. That is, the Government as a party to the contract should have no greater latitude to breach its obligations under the contract than should its private counterpart. See L.L. Hall Construction Co. v. United States, 177 Ct. Cl. 870, 879 (1966) where the court concluded that the Government is not permitted to do as it pleases, disregarding the legitimate interests of the contractor.

<sup>286</sup>See, e.g., Port Arthur Towing Co., ASBCA No. 37516, 90-2 BCA para. 22,857 (1990), aff'd sub. nom., Port Arthur Towing Co. v. Dept. of Defense et al., \_\_\_ F. Supp. \_\_\_, 1991 U.S. Dist. Lexis 9456 (1991). In that case one of the elements for application of the doctrine was that the contracting agency was not the source of the interfering act. See, supra note 92 and accompanying text. Also see, Franchi Construction Co., Inc., ASBCA No. 16735, 74-2 BCA para. 10,654 (1974) where the Board found it significant that the "very department of the Government that entered into this contract with appellant also [precipitated the interference]." Support for this approach to analyzing whether the Government will be held responsible for its acts, despite the sovereign acts doctrine, lies in the fact no cases have been discovered applying this theory of liability where the interfering actor was other than the contracting agency or someone under contract with or who had a "significant bond" with that agency. Thus, while the theory apparently will not apply where the interfering agency is other than the contracting agency or the contracting officer, this should not be read to mean that the implied obligations of the contracting officer or his agency will necessarily overcome the sovereign acts defense. See infra Section IV(A) for discussion of agency unique acts for which, despite interfering with performance, the contracting agency will not be liable.

contracting agency is also the interfering agency does not automatically result in denial of protection under the doctrine.<sup>287</sup>

A potential problem with this analytical approach may lie in the fact that there appears to be a question as to whether the elements of the doctrine have been met, but liability nevertheless attaches,<sup>288</sup> or whether the violation of contractual obligations prevents the act from being classified as a sovereign act.<sup>289</sup> The better reasoned interpretation is that

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<sup>287</sup>See, e.g., Goodfellow Brothers, Inc., AGBCA No. 75-140, 77-1 BCA para. 12,336 (1977) (Fire closure of forest by contracting agency held to be protected sovereign act, declining to follow Empire Gas Engineering Co., ASBCA No. 7190, 1962 BCA para. 3323 (1962)). Also see Carter Construction Co., Inc., ENG BCA Nos. 5495, 5496, 5497, 90-1 BCA para. 22,521 (1989) (Refusal of contracting agency to grant permit to use particular loading facility held to be a protected sovereign act); Aden Music Co., ASBCA No. 28225, 87-3 BCA para. 20,113 (1987) (increase of military per diem rate by contracting agency held to be protected sovereign act); Woo Lim Construction Co., Ltd., ASBCA No. 13887, 70-2 BCA para. 8,451 (1970) (Contracting agency's security regulations rendered performance more expensive, but because it was not an action taken by contracting officer the regulations were held to be a protected sovereign act).

<sup>288</sup>See Latham, The Sovereign Act Doctrine In The Law Of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 29, 41 (1975) where the author refers to such acts as "compensable sovereign acts."

<sup>289</sup>See Granite Construction Co., IBCA No. 947-1-72, 72-2 BCA para. 9762 at 45,586 n.29 (1972) (Act of President in impounding funds appropriated for contract could not be regarded as act of contracting officer). There the Board, citing Speidel, supra note 281 at 518, appears to adopt Speidel's opinion that "the United States as a contractor has an implied duty of cooperation, but the United States as a 'sovereign' does not." Applying this rationale results in the conclusion that anytime the Government is held liable for its acts that violate the implied obligations the Government was acting in its contractual capacity, irrespective of the character of the interfering act. See, e.g., Walden Landscape Co., ENGBCA No. 3534, 75-2 BCA para. 11,538 at 55,073 (1975). There the Board found that the closing of a pit by the city upon the "recommendation" of the Corps of

the nature of the act as a sovereign act does not change,<sup>290</sup> but because of its freely accepted implied duties, the contracting agency's status as a sovereign entity is insufficient to vitiate its responsibilities as a contracting party.<sup>291</sup> Whichever basis is held to be the case, the obligations have been implied against the Government and the contractor has been allowed to recover for what otherwise would have been an noncompensable Government act.

### **3. NATURE OF THE OBLIGATIONS**

Understanding the identity and applicability of the implied

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Engineers was not a sovereign act, but a contractual act. After this finding, the Board opined "[w]here the contracting agency by its own actions inhibits performance or does something which increases the contractor's cost, it cannot escape liability under the doctrine of sovereign immunity." Thus, despite the apparent sovereign nature of the recommendation of the Corps, see, e.g., Amino Brothers Co. v. United States, 178 Ct. Cl. 515, 372 F.2d 485 (1967) (operation and control of flood control system is a sovereign act for which the Government is not liable), the Board refused to find the doctrine applicable citing, *inter alia*, Franchi Construction Co., *supra* note 286. Cf., Glasgow Associates v. United States, 203 Ct. Cl. 532, 495 F.2d 765 (1974). In Glasgow the court opined "[i]t is established that the superior knowledge principle, ..., stands independent of the sovereign act defense." 203 Ct. Cl. at 540 (citing J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 626 (1968) and Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972)).

<sup>290</sup>To hold with the former position creates the possibility of an "infinite loop." This conclusion follows from the fact that the first consideration in determining whether the act in question qualifies for protection under the doctrine is to ascertain whether the act in question is a sovereign act. If the status of the act is dependent upon the applicability of the doctrine, the logic path leads back into itself infinitely.

<sup>291</sup>Cf., Cooke v. United States, 91 U.S. 389 (1875) (when Government freely enters commerce it subjects itself to the same laws as all others participating in it.)

obligations establishes the necessary basis upon which to examine the nature of the obligations most frequently encountered in cases of sovereign acts: the duty to disclose; and, the duty of cooperation.

**a. IMPLIED DUTY TO DISCLOSE**

Generally, the Government has an implied duty to disclose material facts in its possession that would affect contract performance and that were known or should have been known by the contracting agency and known to not be reasonably available to the contractor.<sup>292</sup> Any question that the duty applies to the contracting agency is resolved by the Court of Claims observation that "[t]he Government's status as a sovereign confers upon it no privilege to mislead contractors, or to profit from their ignorance."<sup>293</sup> It is this latter observation that has formed the basis for the decisions of the courts and boards that the Government may be held responsible for breaches of this obligation, notwithstanding the sovereign acts doctrine.

**i. DUTY TO DISCLOSE MATERIAL FACTS**

The Government violates its implied duty to disclose superior knowledge when it fails to disclose material facts. Material facts are those that would materially affect performance.<sup>294</sup> While neither the first such case,<sup>295</sup> nor a sovereign

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<sup>292</sup> T.L. James & Co., ENG BCA No. 5328, 89-2 BCA para. 21,643 (1989).

<sup>293</sup> Bateson-Stolte, Inc., supra note 283, 145 Ct. Cl. at 392-93.

<sup>294</sup> For information to be material it must not only affect performance, it must also be the type of information that the

acts case, Helene Curtis Industries, Inc.,<sup>296</sup> established the nature of the facts that must be disclosed and the Government's responsibility for failure to disclose those facts.

In Helene Curtis the contractor submitted a bid to produce a disinfectant for the Army. The specification required that the disinfectant was to be "a uniformly mixed powder or granular material" and provided the chemical composition of the substance. The contractor was unable to produce the substance by merely mixing the chemicals prescribed in the specification. Subsequent to its efforts, plaintiff learned that the chemicals would only combine properly if the substance was first ground. The contracting agency was aware of the need for grinding but had failed to initially inform plaintiff of this fact. Plaintiff sued to recover the extra costs incurred, inter alia, in grinding which was necessary to produce the required end product set forth in specification. In holding the Government liable for the increased costs, the court stated:

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contractor could have acted upon to prevent the injury resulting from the nondisclosure. See Speciality Assembling & Packing Co. v. United States, 174 Ct. Cl. 153, 174, 355 F.2d 554, 567 (1966).

<sup>295</sup>See, e.g., Bateson-Stolte, Inc. v. United States, supra note 283 (overruling defendant's motion for summary judgment, contracting officer's knowledge that other significant value contracts would be awarded in area stated a claim upon which relief could be granted); Synder-Lynch Motors, Inc. v. United States, 292 F.2d 907 (Ct.Cl. 1961) (contracting officer's failure to disclose significant under estimation in contractor's bid); Ragonese v. United States, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954) (failure to disclose known subsurface condition that could not be discovered with reasonable inspection).

<sup>296</sup>160 Ct. Cl. 437, 312 F.2d 774 (1963).

Possessing special knowledge of the characteristics and uncertainties of [the chemical] as well as the putative problems of compounding the end-product, the Government gave no hint of the necessary information. \*\*\* The disinfectant was novel and had never been mass produced; the Government had sponsored the research and knew much more about the product than did the bidders did or could. \*\*\* In this situation the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own.... [T]he Government-where the balance of knowledge is so clearly on its side-can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.<sup>297</sup>

Thus, the Government cannot withhold material information from, nor mislead, a contractor where the Government is aware of the facts, knows that the contractor needs the information and the contractor cannot discover the information by reasonable inspection.<sup>298</sup> The fact that the governmental act was a sovereign act does not relieve the Government of its obligation to disclose such information.<sup>299</sup>

The extent of the disclosure responsibility was set forth by the board in R&R Enterprises,<sup>300</sup> the facts of which were discussed above.<sup>301</sup> In that case the board observed that "[t]he courts and the Boards have taken an increasingly stringent

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<sup>297</sup> Id. 160 Ct. Cl. at 443-44.

<sup>298</sup> See Hardeman-Monier-Hutchinson v. United States, 198 Ct. Cl. 472 (1972) (Government's failure to apprise contractor of extremely severe weather conditions during certain times of the year at the work site, which contractor did not discover after reasonable inspection, held to violate duty to disclose).

<sup>299</sup> Bateson-Stolte, Inc. v. United States, supra note 283 at 392.

<sup>300</sup> Supra note 279.

<sup>301</sup> See supra text following note 127.

attitude toward the withholding of information the disclosure of which would be likely to have a material effect on a contractor's estimate of costs."<sup>302</sup> Thus, where any information has not been expressly provided to the contractor, the Government exposes itself to liability for failure to disclose, despite the presence of a sovereign act.<sup>303</sup>

A different type of material fact relates to misinformation provided to the contractor.<sup>304</sup> Reason dictates that if government liability attaches where the contracting agency fails to disclose superior knowledge, then liability should also attach where that agency has provided incorrect information. The Court of Claims has discussed this violation of the duty in a sovereign acts scenario infrequently, but one such case was Myers v. United States<sup>305</sup>.

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<sup>302</sup> Id. at 109,150 (quoting Power City Electric, IBCA No. 950, 74-1 BCA para. 10,376 at 49,005 (1974))

<sup>303</sup> See, e.g., Petrochem Services v. United States, 837 F.2d 1076 (Fed. Cir. 1988). There the government alleged that it had made the requisite disclosure orally. The court held "that the government may not satisfy [by oral disclosure] its duty to disclose superior knowledge unless it shows that the communication was not only made, but also heard and understood, actually or apparently." Id. at 1080.

<sup>304</sup> The relationship between misrepresentation and the failure to disclose superior knowledge is based upon the idea that in providing incorrect information to the contractor, the Government has failed to disclose information which is within its control. Admittedly, these concepts are distinct outside of the sovereign acts area, but for purposes of discussion here they will be addressed as variations on a theme.

<sup>305</sup> 120 Ct. Cl. 126 (1951). The decision in Myers, is consistent with the cases deciding this issue outside of the sovereign acts doctrine. See, e.g., Teledyne Lewisburg v. United States, 699 F.2d 1336 (Fed. Cir. 1983) (misrepresentation that Government-furnished drawings were current and correct);

In Myers the contract, which was awarded in 1942, was to construct temporary buildings at an Army Air Corps Gunnery School. The specifications indicated that 75% of the lumber needed for construction had been requisitioned for the contract.<sup>306</sup> In fact, none of the lumber had been requisitioned for the project. The contractor incurred over \$57,000 in delay expenses during the period in which he awaited the lumber. He filed suit to recover those expenses. The Government defended that the operation of the resource allocation system, which precipitated the delay, was a protected sovereign act. The court agreed that operation of the resource allocation system was a sovereign act, but found that the breach claim was based upon the misstatement in the specifications, not operation of the allocation system. The Government was held liable for the damages suffered by the contractor in his justifiable reliance upon the misstatement.<sup>307</sup>

The above lends itself to several conclusions. First, withholding information is clearly effected through a failure to disclose information. Second, withholding may also occur where

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Chris Berg, Inc. v. United States, 186 Ct. Cl. 389, 404 F.2d 364 (1968) (misrepresentation of whether conditions at contract site, where Government had access to information indicating contrary to its representation).

<sup>306</sup>The significance of this information is found in the existence of the priority resource allocation system imposed during World War II.

<sup>307</sup>Accord, Thompson v. United States, 130 Ct. Cl. 1, 124 F. Supp. 645 (1954) (Government failed to order steel in timely fashion, but told contractor that it had ordered the steel. When the Government finally ordered the steel, it ordered an insufficient amount).

the information, originally provided, is no longer correct and the Government is aware of this change.<sup>308</sup>

### ii. INFORMATION KNOWN BY THE CONTRACTING AGENCY

Generally, the information that must be disclosed is that information known by the contracting agency. This limitation results from the principle that knowledge of other agencies generally will not be imputed to the contracting agency.<sup>309</sup> Exceptions to this limitation have been found where there was a significant bond between the contracting agency and the agency with knowledge.

In J.A. Jones Construction Co. v. United States,<sup>310</sup> the contract was to construct various facilities at the Air Force

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<sup>308</sup>The former aspect is manifest in the cases. The latter aspect follows from the prohibition that the Government may not mislead a contractor. See Bateson-Stolte, Inc., *supra* note 283, 145 Ct. Cl. at 392-93. Such an effect may be obtained through either providing incorrect information or failing to correct information that is no longer correct. This conclusion appears to underlie Chief Judge Jones' dissent in Air Terminal Services, Inc. v. United States, 165 Ct. Cl. 525, 330 F.2d 974, *cert. denied*, 379 U.S. 829 (1964), where he stated "[t]here can be no question that the plaintiff was mislead to its damage by the Government's withholding of information" that significantly affected the projections offered as an inducement. 165 Ct. Cl. at 539.

<sup>309</sup>See, e.g. Town of Kure Beach v. United States, 168 Ct. Cl. 597 (1964) (lack of meaningful connection between Reconstruction Finance Corporation and U.S. Army prevented imputing knowledge of one to the other); S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409 (1962) (unreasonable to attribute the information contained in files of one agency to a different governmental department); Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 172 F. Supp. 454, (1959) (overruling defendant's motion for judgment on pleadings, the court noted that given the size of the Government it is unreasonable to impute information between agencies).

<sup>310</sup>182 Ct. Cl. 615, 390 F.2d 886 (1968).

Missile Test Center at Cape Kennedy. The Corps of Engineers (COE) acted as the construction and contracting agency for the Air Force, which was the using agency. Following award and prior to completion of plaintiff's fixed price contract with the COE, the Air Force awarded 27 contracts to be performed in the same area. Twenty of these latter contracts mandated overtime and premium pay to accomplish the contracts. Plaintiff's contract permitted overtime, but only upon the request of the contracting officer. Because of the competition between the contractors for skilled labor to complete the contracts, plaintiff was required to pay premium wages resulting in a loss on his contract. Plaintiff sued to recover these additional costs alleging that the Government failed to disclose the pending award of the additional contracts, which impacted the cost of labor, and that plaintiff could not discover the information after conducting a reasonable inspection of the area where the contract was to be performed.

In addressing plaintiff's claim, the court expressly noted that the claim was not based merely upon the letting of the additional contracts, which would "collide with the sovereign-act doctrine."<sup>311</sup> This disclaimer cannot be read, however, to disassociate the case from the sovereign acts doctrine where little question exists that the acts of the Air Force, in awarding the subsequent contracts, constituted sovereign acts

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<sup>311</sup>182 Ct. Cl. at 618.

within the parameters of the doctrine.<sup>312</sup> Therefore, the analysis employed by the court in addressing the liability of the Government for nondisclosure is apposite to the effect of nondisclosure upon the doctrine.

The court found that there was a duty owed by the Air Force to disclose its intention to award the additional contracts. This duty, imposed upon the noncontracting agency, resulted from the existence of a "meaningful relationship" between the Air Force and the COE.<sup>313</sup> This relationship prevented the COE from being a "truly independent federal agency."<sup>314</sup> The COE's status as a non-independent agency rendered it a mere agent of the Air Force and mandated that the latter disclose the information.<sup>315</sup> The court expressly noted that if the Air Force had been "the

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<sup>312</sup>See Standard Accident Insurance Co. v. United States, 103 Ct. Cl. 607, 59 F. Supp. 407, cert. denied, 326 U.S. 729 (1945) (Government's award of cost plus contracts subsequent to award of plaintiff's fixed price contract was a protected sovereign act).

<sup>313</sup>See, e.g., Bateson-Stolte, Inc. v. United States, 158 Ct. Cl. 434, 305 F.2d 386 (1962) (in dismissing plaintiff's petition under analogous facts, except for the identity between the contracting and interfering agency, the court called "attention" the fact that the contracting and interfering agencies "were different agencies, one agency having no control over the activities of the other, nor the power to bind the other," 158 Ct. Cl. at 461).

<sup>314</sup>If the COE had been a truly independent federal agency there would have been no duty disclose that of which it was unaware since the knowledge of one such agency is not imputed to another. Bateson-Stolte v. United States, supra note 283, 145 Ct. Cl. at 392.

<sup>315</sup>Compare, Unitec, Inc., ASBCA No. 22025, 79-2 BCA para. 13,923 (1979) (Board refused to impute knowledge of Air Force to Corps of Engineers located on base because of absence of "meaningful connection" between the two).

formal contracting agency, there would be no doubt that [the Government] would be liable."<sup>316</sup> The Air Force's violation of the duty to disclose vitiated the protection of the sovereign acts doctrine.<sup>317</sup> Thus, the information that must be disclosed includes not only that information known to the contracting agency, but also-under limited circumstances-information which reasonably can be imputed to it.<sup>318</sup>

### **iii. INFORMATION NOT AVAILABLE TO CONTRACTOR**

The duty to disclose is not violated, and hence will not overcome the sovereign acts defense, where the information was otherwise available to the contractor. This conclusion follows from the criteria set forth in Helene Curtis<sup>319</sup> and the decision in T.L. James Co.<sup>320</sup> In the latter case, the contract was awarded in June 1982 for channel improvement on the Yazoo River, which contained various flood control gates. In January 1981,

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<sup>316</sup>182 Ct. Cl. at 623.

<sup>317</sup>The fact that the court had "no doubt" that the Air Force would have been liable if it had been the formal contracting agency lends credence to the distinction between the acts of the contracting agency as opposed to those of a different "truly independent" interfering agency.

<sup>318</sup>See, e.g., Guard-All of America, ASBCA No. 22167, 80-2 BCA para. 14,462 (1980). There the contractor was located out of state; while the contracting officer was located near the contract site. The GSA conducted public disposition proceedings regarding the property. Those proceedings, coupled with the knowledge of co-located noncontracting personnel, who were responsible for accounting for the contractual property, served as sufficient basis upon which to impute to the contracting officer knowledge of a different agency.

<sup>319</sup>See supra note 219 and accompanying text.

<sup>320</sup>Supra note 292.

the Mississippi River Commission (MRC) adopted a plan whereby the amount of water released from the flood control locks would be different than during past years, with more water released during certain periods and less during others.<sup>321</sup> The plan was adopted only after extensive public information had been disseminated by the MRC. During the contract performance period, the area surrounding the work site received extensive rainfall. The flood gates were operated in accordance with the plan, which the contractor maintained was contrary to the contract. This operation of the flood gates necessitated extensive delays in completing the contract. The contractor filed a claim seeking compensation for the delays precipitated by the operation of the flood gates in accordance with MRC's plan, asserting that the Government failed to disclose superior knowledge, gained through implementation of MRC's plan, about which the contractor was ignorant.

Before determining that the weather, not operation of the flood control system caused the delay, the board noted:

Appellant's "superior knowledge" argument circumvents the Government's "sovereign acts" defense since that argument is directed not at the actual manner in which the Government operated the reservoirs under the [MRC's plan], but at the Government's failure to disclose, in its contractual capacity, the fact that there had been a change in the plan of operations.<sup>322</sup>

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<sup>321</sup>The contract indicated that the flood gates would be closed when the water level reached 106 feet, but the gates had historically remained open until the water level reached 108-109 feet. This information was contrary to the planned openings and closings of the gates under the MRC's plan.

<sup>322</sup>Id. at 108,890.

The Board then opined that even if Appellant had proved that it was operation of the reservoirs that caused the delay, recovery would be barred by the sovereign acts doctrine. The only rationale for such a conclusion lies in the fact that the information, regarding the contents of the MRC plan, was information in the "public domain" and was therefore reasonably available to Appellant.<sup>323</sup> The Board concluded that "the 'superior knowledge' doctrine was not intended to remedy informational asymmetries caused by failure of the contractor diligently to investigate knowledge within its fair and reasonable reach."<sup>324</sup> Thus, the Government's duty to disclose is tempered by the qualification that it possess superior knowledge that was otherwise unavailable to the contractor.

**b. DUTY TO COOPERATE**

As set forth above, the duty to cooperate is composed of two closely related aspects: the duty to act with reasonable diligence and the duty to not hinder the other party's performance. As with all of the implied duties, governmental liability for violations of this duty is dependent upon the

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<sup>323</sup>Cf., Aden Music Co., ASBCA No. 28225, 87-3 BCA 20113 (1987) (no duty to disclose where contractor could have, just as easily as the Government, ascertained the status of legislation permitting increase in military per diem rates).

<sup>324</sup>Id. at 108,888. Also see American Stevedores, Inc., ASBCA No. 10979, 69-2 BCA para. 8048 (1969) (no duty to disclose where contractor had actual knowledge of sovereign acts that would affect contract performance); Glasgow Associates v. United States, 203 Ct. Cl. 532, 495 F.2d 922 (1974) (assertion of "superior knowledge" found to be meritless where plaintiff had sufficient knowledge to protect itself against increase in interest rate guaranty by FHA).

identity of the actor and the nature of the interfering act.<sup>325</sup> Where the interfering actor is the contracting agency and the act violates one of these implied duties, the Government generally will be held liable for the damages resulting from violating these duties.

#### **1. DUTY TO ACT WITH REASONABLE DILIGENCE**

"It is too well established to require citation that in the absence of a specific time for action, the law requires the parties to act within a reasonable time."<sup>326</sup> Depending upon the identity of the interfering actor and the nature of the interfering act, the duty may be violated by actions of the Government in its sovereign capacity. Whether the Government has fulfilled this obligation is dependent upon the facts surrounding the Government's actions or failure to act.<sup>327</sup> This

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<sup>325</sup>Sunswick Corp. v. United States, 109 Ct. Cl. 772, 75 F. Supp. 221, cert. denied, 334 U.S. 827 (1948).

<sup>326</sup>Kirinn & Co., ASBCA No. 14533, 70-1 BCA para. 8275 at 38,468 (1970).

<sup>327</sup>See, Peter Kiewit Sons' Co. v. United States, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957) (items to be provided by the Government must be furnished in the ordinary and economical course of performance); Pan-Pacific Corp., ENG BCA No. 2479, 65-2 BCA para. 4,984 (1965) (Where Government is required to provide an essential element of the contract, that obligation must be met within sufficient time so as to not delay the contractor). One author has compared the standard of reasonableness by which the Government's actions are to be measured to the concept of "objective impossibility" to perform in a timely manner. Speidel, supra note 281 at 527. Cf., Restatement sec. 205 Comment d, in which the implied duty of good faith and fair dealing is breached in the area of performance by "lack of diligence and slacking off." Cf., Garcia Concrete, Inc., AGBCA No. 78-105-4, 82-2 BCA para. 16,046 (1982) (Suspension of work necessitated by Government's failure to obtain application for required permit in a timely manner, not by the regulations requiring the permit).

obligation, as with all of the implied obligations, exists as part of every contract into which the Government enters.<sup>328</sup> Where the failure to fulfill this obligation is the contracting agency's, the Government is responsible for damages resulting from the failure.<sup>329</sup> While litigated infrequently, the cases involving breaches of this duty usually arise as the result of Government negligence. One such case, in the sovereign acts area, was Peter Kiewit Sons' Co. v. United States.<sup>330</sup>

The facts of that case involved the allocation of resources pursuant to a priority resource allocation system. The Government ordered the plaintiff to proceed with the construction project without arranging for the delivery of the necessary material that the Government was responsible for providing. No specific delivery date for the Government furnished material was established. The necessary material was produced by the supplier, but the Government had effectively diverted it to other contracts that had been awarded after plaintiff's contract, by giving the later awarded contracts earlier delivery dates. Plaintiff was not notified of the nonavailability of the material for seven months after the Government became aware of the fact and incurred delay costs during the interim. In

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<sup>328</sup>Lebanon Chemical Corp. v. United States, 5 Cl. Ct. 812 (1984); Peter Kiewit Sons' Co. v. United States, supra note 327, 138 Ct. Cl. at 674.

<sup>329</sup>Id. at 675. Accord, Chandler v. United States, 127 Ct. Cl. 557, 563, 119 F. Supp. 186, 190 (1954); M.D. Funk, ASBCA No. 20287, 76-2 BCA para. 12,120 (1976) (unreasonable delay by Government in providing priority material).

<sup>330</sup>Supra note 327.

holding for the plaintiff, the court observed:

When the contract does not specify particular dates upon which delivery of the material is to be made, the implied obligation [of cooperation] is an obligation not to willfully or negligently fail to furnish the materials in time to be installed in the ordinary and economical course of the performance of the contract, .... If the Government exerts every effort to supply the contractor with the necessary materials on time, it cannot be held that it has willfully or negligently interfered with performance.... [Here] the Government acted without proper and adequate consideration for the interests of the plaintiffs in regard to the [material in question].<sup>331</sup>

As implied in Peter Kiewit Sons', if the act preventing prompt performance had been an act beyond the control of the contracting agency, then liability would not attach.<sup>332</sup> Among such acts are sovereign acts of the Government, which normally are found where the interfering agency is not the contracting agency. This conclusion is borne out by the typical results of delay claims filed where the interfering act was the operation of the priority resource allocation system.<sup>333</sup>

Similar analysis was employed and results obtained where

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<sup>331</sup>Id., 138 Ct. Cl. at 674-75 (citations omitted). Contrast this decision with Piasecki Aircraft Corp. v. United States, 229 Ct. Cl. 208, 667 F.2d 50 (1981), where the Government's purchase of material urgently needed by contractor to complete performance did not violate the duty to not hinder where the Government was not aware of the contractor's need.

<sup>332</sup>From the facts, it is difficult to ascertain whether the diversion of the material in question was effected by the contracting agency, but because of the nature of the material, penstock, and the reference to the duty of cooperation it appears likely. This conclusion is based upon the fact that no cases have been discovered applying the duty not to hinder against any agency except the contracting agency.

<sup>333</sup>See, e.g., Acme Missile & Construction Corp., ASBCA No. 11794, 68-1 BCA para. 6734 (1967). Also see supra Section III(C)(1)(a)iv.

the Government failed to take reasonable actions in providing for timely delivery of the items;<sup>334</sup> where the Government issued an order to proceed knowing that the necessary material would not be timely available;<sup>335</sup> and, where the Government delayed in ordering, and ultimately ordered insufficient quantities of, material required by the contract.<sup>336</sup> The extent of the obligation has been summarized by the Court of Claims in the following terms:

Logic would seem to require that a contract binding one party to fabricate goods for another by a certain time out of materials to be furnished by the other must perforce be held also to bind the other party to supply the material sufficiently early for the work to be done as promised and not be dilatory in accepting the completed goods.<sup>337</sup>

Thus, where the Government has agreed to provide materials, without establishing a date for delivery, the contracting agency's failure to act in a reasonable manner to provide those materials will render it liable for delays caused by its

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<sup>334</sup>Ozark Dam Constructors v. United States, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955), pet. dismissed, 288 F. Supp. 913 (Ct. Cl. 1961) (Government failed to seek alternative methods of delivery after railroad strike, which was foreseeable by contracting officials).

<sup>335</sup>Chandler v. United States, 127 Ct. Cl. 557, 119 F. Supp. 186 (1954).

<sup>336</sup>Thompson v. United States, 130 Ct. Cl. 1, 124 F. Supp. 645 (1954).

<sup>337</sup>Kehm Corp. v. United States, 119 Ct. Cl. 454, 469, 93 F. Supp. 620, 623 (1950). Cf., H.R. Beebe, Inc., ASBCA No. 4606, 59-2 BCA para. 2301 (1959) (unreasonable government delay in inspecting and accepting work resulted in Government being held liable for damage to contract end item that had not yet been accepted by Government).

failure, despite the protection afforded by the sovereign acts doctrine.

While negligence may be a factor in determining whether the Government has exercised reasonable diligence vis-a-vis unspecified delivery dates, it apparently plays almost no role where the contract establishes a date for Government performance. Where such a date is specified and the Government fails to perform, the failure constitutes a breach of the contract, unless the failure is attributable to a protected sovereign act. This conclusion is implied in Lebanon Chemical Corp. v. United States,<sup>338</sup> without reference to negligence or willingness on the part of the contracting agency.

There the contract was implied-in-fact and resulted from an Environmental Protection Agency (EPA) decision to cancel the registration of substances containing silvex. The plaintiff and EPA entered into an implied contract under which the plaintiff was to collect the substances and hold them until a disposal site was designated. The designation was to occur within eight months. For some unknown reason, the EPA failed to designate the disposal site within the specified period.

The court decided the case upon the theory that the EPA's failure constituted a breach of an express obligation under the contract. While the Government maintained that the agreement was entered into pursuant to a sovereign act, the court noted "that there [was] no allegation articulated that [the agency's]

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<sup>338</sup>Supra note 328.

failure to fulfill its promise to designate disposal sites within a stated period of time was in any way due to government acts in a sovereign capacity."<sup>339</sup>

Thus, the Government's responsibility under this duty is merely that imposed upon any other contracting party. Where no date is specified for Government performance, the law implies performance within a reasonable period. Government negligence or willful failure will vitiate the protection otherwise afforded by the sovereign acts doctrine. Where a date for Government performance is established and the Government fails to meet this date, liability will attach, absent the intervention of a protected sovereign act rendering timely performance impossible.

#### **ii. DUTY TO NOT HINDER PERFORMANCE**

Where the contracting agency interferes with or prevents performance, either directly or indirectly,<sup>340</sup> it violates its

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<sup>339</sup>Id. at 817. The one question that exists, and which the court did not have to decide, is whether the sovereign acts of the contracting agency would have excused the Government's failure to act within the established period. The court has previously held that the sovereign acts doctrine "does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." Saul Freedman v. United States, 162 Ct. Cl. 390, 402, 320 F.2d 359, — (1963). See Sunswick Corp. v. United States, supra note 325. Cf., Miller v. United States, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956) (considering but not deciding the issue). Applying the analysis set forth infra in subsection (bb), the result will depend upon the nature of the interfering act. If it is an agency unique act, then the doctrine should apply and liability should not attach. If, however, the act does not qualify as such an act, then liability should attach. See infra Section IV (A) (3) (b) (ii) (bb).

<sup>340</sup>See, e.g., L.L. Hall Construction Co. v. United States, 177 Ct. Cl. 870, 379 F.2d 559 (1966), where the court opined

implied duty of cooperation and, subject to certain exceptions, generally will be held liable for the damages incurred by the contractor.<sup>341</sup> Government liability will "depend[] not only upon the nature of the act which is alleged to have increased the burden of the performance, but as well upon the intention of the parties ... either expressed or implied in the contract."<sup>342</sup> The duty to not hinder performance, by its very nature, clashes head-on with the protection afforded by the sovereign acts doctrine. After all, the nature of the doctrine is to shield from liability Government actions that interfere with contract performance. At the same time, the nature of the obligation is to insure that neither contracting party does anything to hinder contract performance. While the trend clearly appears to be

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"the Government is obligated to prevent interference with orderly and reasonable progress of a contractor's work by other contractor's over whom the Government has control." 177 Ct. Cl. at 879 (citing Peter Kiewit Sons' Co. v. United States, supra note 327). Accord Hoffman v. United States, 166 Ct. Cl. 39, 340 F.2d 645 (1964). Also See American International Constructors, Inc., ENG BCA Nos. 3633, 3667, 77-2 BCA para. 12,606 (1977) (where Government has control over the dilatory contractor interfering with performance on another contract, it must do everything within reason to insure that the dilatory contractor does not interfere with the performance of the second contract).

<sup>341</sup>See, e.g., Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 (1990) (denying Government motion for summary judgment); O'Neill v. United States, 231 Ct. Cl. 823 (1982) (disposed of by order); Lewis-Nicholson, Inc. v. United States, 213 Ct. Cl. 192, 550 F.2d 26 (1977); J.D. Hedin, Construction Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235 (1965); Khem Corp. v. United States, 119 Ct. Cl. 454, 93 F. Supp. 620 (1950). The exception to this general rule lies in those situations where the contract expressly provides for such eventualities, e.g., termination for convenience.

<sup>342</sup>Sunswick Corp. v. United States, supra note 325, 109 Ct. Cl. at 790.

that violations of this duty by the contracting agency will render the Government liable for damages suffered by the contractor, the path to this conclusion is not without exceptions and application may very well be fact specific.

**(aa) SCOPE OF THE DUTY TO NOT HINDER**

There appears to be some question as to what the Government must do to satisfy this obligation. In the majority of cases the duty is simply not to hinder performance.<sup>343</sup> On the other hand, some decisions have gone so far as to maintain that not only must the Government not hinder performance, there is also a duty to render affirmative assistance.<sup>344</sup> The affirmative duty arises as a result of the Government's superior knowledge<sup>345</sup> or unique position vis-a-vis contract funding<sup>346</sup> or

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<sup>343</sup>See, e.g., Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964); William A. Smith Contracting Co. v. United States, 155 Ct. Cl. 1, 292 F.2d 847 (1961).

<sup>344</sup>R&R Enterprises, supra note 279; L.L. Hall Construction Co. v. United States, supra note 340 (citing Peter Kiewit Sons' Co. v. United States, supra note 327, 138 Ct. Cl. at 675); Lewis-Nicholson v. United States, 213 Ct. Cl. 192, 550 F.2d 26 (1977).

<sup>345</sup>For the most part, the facts in the cases finding an affirmative duty center around the superior knowledge of the Government which places it in a position requiring that it volunteer such information pursuant to its implied duty of good faith and fair dealing. See, supra, Section IV(A)(3)(a).

<sup>346</sup>See supra Section III(C)(1)(a)(v) regarding the contracting agency's responsibilities in this area. Generally, the Government breaches its duty to not hinder by failing to request the amounts it has approved for earnings under the contract. S.A. Healy Co. v. United States, 216 Ct. Cl. 172, 576 F.2d 299 (1978). The focus here apparently is that the contracting agency must do that which is reasonable to facilitate the contractor's performance. With decreasing federal budgets the question becomes whether budgetary realism will be ignored and the obligation dictate that an agency make a quixotic effort to

where the Government has specifically obligated itself to perform a particular act.<sup>347</sup> Given the fact that the duty to provide affirmative assistance arises only in very specific situations, by and large, the duty is simply that neither party to the contract will do anything to hinder performance of that contract.<sup>348</sup> One limit on the scope of the duty to cooperate is clear, however, "[a] party to the contract need not act as a volunteer to provide assistance not expressly or impliedly required by the contract."<sup>349</sup>

**(bb). APPLICABILITY OF THE DUTY NOT TO HINDER**

As mentioned above, no cases have been discovered where the duty to not hinder was held to have been violated by the acts of a different agency. Thus, empirically, the duty is implied only

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obtain funding or is the simple submission of a "wish list" sufficient to fulfill the obligation. To this writer, "real world" considerations dictate that the obligation requires that the agency request that which it needs and as long as the allocation process, notwithstanding the discretion vested in the agency, is reasonable the obligation should be considered met. See Gunther and Shirley, ENG BCA No. 3691, 78-2 BCA para. 13,454 (1978). The duty to cooperate mandates all reasonable action, not pointless effort.

<sup>347</sup> Lebanon Chemical Corp. v. United States, 5 Cl. Ct. 812 (1984); Saul Freedman v. United States, 162 Ct. Cl. 390, 320 F.2d 359 (1963).

<sup>348</sup> Obviously this obligation carries with it some of the affirmative duties, if the contract funding and specific undertaking can really be considered affirmative duties. In the first instance failure to request sufficient funds is the easiest way for the Government to hinder performance. As for the undertaking of a specific task, that constitutes an express part of contract performance for which the Government would be liable for breach. Lebanon Chemical Corp. supra note 328.

<sup>349</sup> Moore Mill & Lumber Co., AGBCA No. 87-172-1, 90-3 BCA para. 23,111 at 116,034 (1990) (citing Petrofsky v. United States, 222 Ct. Cl. 450, 616 F.2d 494 (1980)).

against the contracting agency. Even considering solely the acts of the contracting agency, application of the obligation has been the subject confusion and ostensible inconsistency. In some cases the conflict is more semantic than real and is largely the result of imprecise language and a failure to distinguish between the contracting agency and the rest of the Government. In other cases the inconsistency is explained by the identity of the true interfering agency. In the third set of decisions there is no explanation for the inconsistency, beyond the nature of the interfering act.

An illustration of the use of imprecise language presenting an ostensibly inconsistent result is presented by Wah Chang Corp. v. United States.<sup>350</sup> In that case the court acknowledged the existence of the duty, but held that it was inapplicable to

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<sup>350</sup> Supra note 282. Another instance of the confusion precipitated by the use of imprecise language is seen in Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 351 F.2d 956 (1965). In that case the plaintiff had a contract with the Army Corps of Engineers. Because of emergency construction nearby at Hill Field, an Air Force installation, the plaintiff had difficulty in acquiring skilled laborers. Plaintiff alleged that the Government hindered performance by awarding the contracts in a tight labor market. The court acknowledged the existence of the duty to not hinder, but held that it was not violated in this case. The general language of the court identifying only the "Government" sheds no light upon the identity of the agency awarding the contracts at Hill Field. If in fact it the interfering agency was not the contracting agency, no conflict appears to exist. See, e.g., Standard Accident Insurance Co. v. United States, 103 Ct. Cl. 607, cert. denied, 326 U.S. 729 (1945). Cf., Joseph H. Beuttas v. United States, 111 Ct. Cl. 532, 77 F. Supp. 933 (1948) (noting that the cases upholding the sovereign acts doctrine involved an interfering act by a different agency). On the other hand, if the contracting agency for plaintiff's contract was also the agency involved in the contracts at Hill Field the result here is unexplainable. See J.A. Jones v. United States, supra note 289.

the "Government" when it acted in its sovereign capacity. The facts in that case indicate that the plaintiff entered into a contract with the Metals Reserve Company, established by the Government pursuant to congressional statute. Plaintiff was awarded a contract by the Metals Reserve Company to refine tungsten in August 1941. In furtherance of this award, plaintiff enlarged his plant and extended his lease on the premises, located on Staten Island. Because of concern over the secrecy surrounding the movement of troops out of New York Harbor during World War II, the Army sought condemnation of the property on which plaintiff's plant was located. When the condemnation was granted, the contractor was forced to relocate his plant, necessitating additional expense to fulfill his contract with the Metals Reserve Corporation. Thus, the interfering act was not that of the contracting agency, but rather an act by a different agency, the U.S. Army.<sup>351</sup> Reading the decision in Wah Chang in the context of its facts, the duty to not hinder owed by a contracting party is undisturbed, even in the sovereign

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<sup>351</sup>There is some question regarding the relationship between the Metals Reserve Company, the War Production Board and the Army. Because the Metals Reserve Company was established by the Reconstruction Finance Corporation, pursuant to section 5 of the act of June 25, 1940, 54 Stat. 572, the Metals Reserve Company appears to have been established as an agency independent of the Army. While this status may have changed, in view of mobilization of the economy in support of the war, this should have little effect upon the contractual relationship between the parties. Cf., Town of Kure Beach v. United States, 168 Ct. Cl. 597 (1964) (Congressional Reference case) (Contract between plaintiff and Reconstruction Finance Corporation was hindered by Army's creation of buffer zone around an ammunition depot, did not breach duty of cooperation owed by contracting party since the interference was not effected by contracting agency).

acts arena.<sup>352</sup>

Imprecise language, however, does not explain all of the inconsistent decisions. There are instances where the contracting agency hindered performance, but the court did not apply the duty. In some cases the explanation for such a result may be found in the age of the decision.<sup>353</sup> Other decisions, of more recent origin, may be reconciled by the fact that the contracting agency was not truly the interfering agency, but merely acted as a conduit for a different agency.<sup>354</sup>

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<sup>352</sup>Decisions from the court, both prior and subsequent to the decision in Wah Chang support this conclusion. See, e.g., George A. Fuller v. United States, supra note 283, 108 Ct. Cl. at 94 (implied provision in every contract that neither party to the contract will do anything to hinder performance); Joseph H. Beuttas v. United States, supra note 350 (court distinguished between those cases applying the sovereign acts doctrine and the instant case by noting that the cases upholding the Horowitz doctrine were all acts of a different agency); Dale Construction Co. v. United States, 168 Ct. Cl. 692, 700 (1965) (court noted that the duty was owed by parties to the contract); S.A. Healy Co. v. United States, supra note 346 (duty to not hinder performance owed by contracting agency). Similar construction has been applied by the boards. See, e.g., R&R Enterprises, supra note 279; DWS, Inc., ASBCA No. 33245, 87-3 BCA para. 19,960 (1987); Walden Landscape Co., supra note 289.

<sup>353</sup>See, e.g. Wilson v. United States, 11 Ct. Cl. 513 (1875). See, supra text following note 236 for a discussion of the facts of this case. While the court did not apply the duty to not hinder, the fact that the case was decided over 100 years ago does not rebut the present trend.

<sup>354</sup>See, e.g., Hills Materials Co., ASBCA Nos. 42410, 42411, 42413, 92-1 BCA para. 24,636 (1991) (in implementing OSHA safety standards the contracting agency merely acted as a conduit, so no violation of duty not to hinder performance). See also Bared International Co., Inc., ASBCA No. 30,048, 88-1 BCA para. 20,378 (1987), aff'd on reconsid., 88-3 BCA para. 21,139 (1988) Aden Music Co., ASBCA No. 28,225, 87-3 BCA para. 20,113 (1987). In both of these latter cases the agency implemented the authorization by the Department of Defense to increase per diem and messing rates, respectively, which in turn had been authorized by Congress pursuant to a military appropriations act. Thus,

The most difficult cases to reconcile with the duty to not hinder are those cases where the contracting agency is acting independent of another agency and hinders performance, but the duty is found not to have been violated.<sup>355</sup> A possible explanation for these "inconsistent" results lies in the rationale that where "a defendant would never have expressly agreed to such a provision, it cannot be successfully contended that the defendant impliedly agreed to it."<sup>356</sup> The difficulty with this rationale, in the case of the obligation at issue here, is that the obligation in question is not implied because the agency would otherwise have agreed to it, but because as a matter of law the obligation exists.<sup>357</sup> Thus, the explanation must be found in the nature of the interfering act.<sup>358</sup>

Some of the most frequently litigated instances of conduct by the contracting agency that hinder performance appear in the

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arguably the interfering act that made performance more costly was not an act of the contracting agency. See supra Sections III(C)(2)(a)(ii) and (2)(b)(ii) for additional cases where the doctrine was applied because of the acts of the contracting agency or contracting officer were those of a conduit.

<sup>355</sup>See supra Section III(C)(2)(a)(i) for a discussion regarding cases of independent acts by the contracting agency that have been held to be entitled to the doctrines protection despite hindering performance.

<sup>356</sup>Bateson-Stolte, Inc. v. United States, 158 Ct. Cl. 455, 460, 305 F.2d 386, \_\_\_ (1962).

<sup>357</sup>United States v. Bostwick, supra note 283.

<sup>358</sup>See the first prong of the test for applicability of the implied obligation, the nature of the interfering act, is set forth in Sunswick Corp. v. United States, supra note 325 and accompanying text. Also see supra Section III(C)(2)(a)(i) regarding agency unique acts.

closing of national forests by the National Forest Service due to the threat of forest fires.<sup>359</sup> But even in these cases the results are not necessarily uniform.<sup>360</sup> As discussed earlier,<sup>361</sup> the rationale for such protection being afforded acts of the contracting agency, which clearly contravene the implied obligation to not hinder performance, must lie in the nature of the act. Where agency unique actions are involved, there is no other method by which to effectuate the act than by the contracting agency. If the implied obligation to not hinder was imposed upon the agency under such circumstances, a significant possibility exists that the Government would be hindered from acting freely in those cases where the act was unique to

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<sup>359</sup>See, e.g., Gary Hegler, AGBCA No. 89-145-1, 1991 AGBCA LEXIS 61 (October 18, 1991) (appeal granted in part on other grounds); Lloyd H. Kessler, Inc., AGBCA No. 88-170-3, 91-2 BCA para. 23,802 (1991); Goodfellow Bros., Inc., AGBCA No. 75-140, 77-1 BCA para. 12,336 (1977); L.S. Matusek, ENG BCA No. 3080, 72-2 BCA para. 9,625 (1972) (appeal granted in part based upon contract language limiting risk assumed by contractor to "short periods"); James Farina Corp., ENG BCA 1807, unpub., (April 10, 1961). Other instances of similar results are found in the area of security regulations and in the operation of flood control systems. See supra note 223.

<sup>360</sup>See Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 (1990) (denying Government motion for summary judgment). In denying the motion the Board noted "the involvement of the contracting agency is only one element of the analysis required to determine whether the Government is immune" from liability for its interference, Id. at 119,183.

<sup>361</sup>See supra note 238. Also see Winstar Corp. v. United States, Cl. Ct. \_\_, 1992 U.S. Cl. Ct. Lexis 135 (April 21, 1992) (where the "government act is not literally 'general in application, emphasis has been placed upon the compelling 'public' nature of the act." citing Wah Chang Corp. v. United States, supra note 282).

the agency.<sup>362</sup>

If all of these factors are taken into consideration, there is very little inconsistency in the application of the duty. Instead, the decisions are the result of measuring the Government's obligation by a system of rules that considers both the nature of the act and the identity of the interfering agency. Where the act is one that lies solely within the authority of the contracting agency, charged with a unique responsibility, the fact that no other agency is authorized to take such an action necessitates application of the dual capacity theory<sup>363</sup> to delineate the contracting agency into two capacities, that of a contracting party and that of a sovereign actor.<sup>364</sup> Where the interfering act does not fall within this category, the contracting agency will be held responsible for its violation of the implied duty to not hinder performance.<sup>365</sup>

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<sup>362</sup>The obvious rejoinder to this argument is that the agency is not prevented from taking such actions, only that they must accept the responsibility for the consequences of such acts. While this position is true, it appears to run contrary to the public purposes to be served by the sovereign acts doctrine, see supra Section II(B). Given this contravention, it is unlikely that imposing such an obligation, under the circumstances, would pass any balancing of public interests and private loss.

<sup>363</sup>See supra Section II(A)(1) for discussion of the "dual capacity" theory.

<sup>364</sup>See Carter Construction Co., ENG BCA Nos. 5495, 5496, 5497, 90-1 BCA para. 22,521, at 113,028 (1989) (acts denying use of particular loading facility pursuant to contracting agency regulations were "not taken by the District Engineer in his alternative capacity as a contracting officer of the contracts in issue").

<sup>365</sup>See, e.g., Florida East Coast Railway Co. v. United States, slip. op. February 5, 1980, adopted, 228 Ct. Cl. 647, 660 F.2d 474 (1981). Also see Franchi Construction Co., ASBCA

## B. CONTRACT CLAUSES

Contractor recovery for the effects of a sovereign act under contract clauses<sup>366</sup> has been limited.<sup>367</sup> Nevertheless, absent an agreement to compensate a contractor for the effects of a sovereign act, no recovery under the contract is possible.<sup>368</sup> This conclusion follows from the fact that liability is derived from the clause, not from the sovereign act.<sup>369</sup> Thus, the primary method by which the risk of sovereign

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No. 16735, 74-2 BCA para. 10,654 (1974). While not expressly deciding the case based upon a violation of the implied duty to not hinder, the Board's emphasis upon the fact that "the very department of the Government that entered into [the] contract" promulgated the interfering act permits the inference that the obligation was considered in deciding the case against the contracting agency.

<sup>366</sup>While recovery is often the result of the interaction of many factors within and without the language of the contract, in this section discussion is centered strictly upon recovery under contractual provisions.

<sup>367</sup>To say that success has been limited is an understatement. The validity of this conclusion is seen by appreciating the fact that prior to 1978 jurisdiction of the boards extended only to disputes arising "under the contract." See R. Nash & J. Cibinic, Administration of Government Contracts, (hereinafter Government Contracts) 948 (2d ed., 2d printing, 1986) (prior to enactment of Contracts Dispute Act of 1978 board jurisdiction was limited to those claims for which relief could be granted under a remedy-granting provision of the contract). Also see Martin K. Eby Construction Co., IBCA No. 1389, 81-1 BCA para. 15,052 (1981) (dismissing appeal because of absence of an applicable remedy-granting provision in the contract). Thus, except for the cases discussed above regarding the implied duties, all of the board decisions regarding sovereign acts prior to 1978 involved claims seeking recovery under contract provisions. As the foregoing material has revealed, those cases were largely unsuccessful, absent a contract provision to the contrary.

<sup>368</sup>Hawaiian Dredging & Construction Co., ASBCA No. 25594, 84-2 BCA para. 17,290, at 86,113 (1984). Accord, McGrail Equipment Co., ASBCA No. 20555, 76-1 BCA para. 11,723 (1976).

<sup>369</sup>See, e.g., Hill Brothers Construction Co., ENG BCA No.

acts is shifted between the contracting parties is through contract clauses.<sup>370</sup> Two basic principles control this risk allocation: first, the Government "cannot enter into a binding agreement that it will not exercise a sovereign power;"<sup>371</sup> second, "the extent of Government liability will be limited by the express terms of the contract."<sup>372</sup> Moreover, claims that fall within the area addressed by a contract clause cannot be maintained under separate breach of contract actions.<sup>373</sup> Where the Government has accepted liability for the effects of its sovereign acts the contractor will be entitled to an equitable adjustment in the contract price.<sup>374</sup> Three clauses under which

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5686, 90-3 BCA para. 23,276 (1990) (denying cross motions for summary judgment).

<sup>370</sup> Aviation Enterprises, Inc., ASBCA No. 34505, 89-1 BCA para. 21,192 (1988) aff'd on reconsid., 89-3 BCA para. 21,995 (1989). Also see FAR 52.249-8 through -10 and 52.249-14.

<sup>371</sup> United States v. Bostwick, supra note 283; Gerhardt F. Meyne Co. v. United States, 110 Ct. Cl. 527, 76 F. Supp. 811 (1948); Sunswick Corp. v. United States, supra note 325.

<sup>372</sup> Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800, at 119,182 (1990). Accord, Hawaiian Dredging & Construction Co., supra note 368, at 86,110. Also see Moore Mill & Lumber Co., AGBCA No. 87-172-1, 90-3 BCA para. 23,111 (1990). Also see L.S. Matusek, supra note 359 (adjustment for delay beyond "short" period of delay provided in contract).

<sup>373</sup> Johnson & Sons Erectors Co. v. United States, 231 Ct. Cl. 753, cert. denied, 459 U.S. 971 (1982); Edward R. Marden Corp. v. United States, 194 Ct. Cl. 799, 442 F.2d 364 (1971).

<sup>374</sup> See, e.g., L.S. Matusek, supra note 359 (clause interpreted to provide for recovery for suspension of work beyond "short" period); Universal Power Corp. v. United States, 112 Ct. Cl. 97 (1948) (contract provided for adjustment for delay due to any act of the Government).

contractors have sought relief from the effects of a sovereign act are: (1) price adjustment clauses; (2) suspension of work clauses; and, (3) changes clauses.<sup>375</sup>

#### 1. PRICE ADJUSTMENT CLAUSES

Absent specific price adjustment clauses, the courts and boards have uniformly held that recovery for damages suffered as a result of increased costs resulting from a sovereign act is not permitted.<sup>376</sup> Price adjustment clauses permitting equitable adjustments have been of two varieties: (1) those that specifically addressed increases in price resulting from sovereign acts; or, (2) those that act independently of a sovereign act but nevertheless permit adjustment in the face of such an act. An example of the first type is found in Pacific Architects & Engineers, Inc.<sup>377</sup>

In that case, the contract was to provide services at a

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<sup>375</sup>Contractor's have also sought recovery under delay clauses, but consistently have been unsuccessful. See, e.g., Weaver Construction Co. supra note 372, where the board, examining the delay language of the clause in FAR 52.249-10, concluded that absent additional contract language to the contrary, the contractor's sole remedy is an extension of time. Costs associated with delays, where recovery has been allowed, have usually been recovered based upon violations of the Government's implied duties under the contract, see supra Section IV(A), or as the result of an implied promise to compensate, see, infra Section IV(C). The closest that contractors have come to recovery for delay, under the delay clause, has occurred where there was an improper termination for default following a delay caused by a sovereign act. See Universal Power Corp. v. United States, supra note 374.

<sup>376</sup>See supra Section II(C)(1) regarding denial of recovery absent a clause permitting recovery.

<sup>377</sup>ASBCA No. 21168, 79-2 BCA para. 14,019, reconsid. denied, 79-2 BCA para. 14,174 (1979), aff'd on different grounds, 230 Ct. Cl. 1024 (1982).

United States' military installation in Greece. Greek nationals comprised a substantial portion of the contractor's labor force. During the Greek-Turkish war of 1975, the Greeks mobilized their reserve military forces, which in turn deprived the contractor of a number of workers. In order to continue contract performance the contractor was forced to acquire other labor at a higher cost. He filed for an adjustment in the contract price based upon the "Contingency Factors" clause in the contract. The clause provided for negotiation of an adjustment in contract price for acts of the "Greek and/or U.S. Government in their sovereign capacity" that increased the cost of performance. The Board opined that the term sovereign capacity, due to the presence additional language in the clause, was subject to three different types of sovereign act: all sovereign acts; sovereign acts of a commercial nature affecting wages and prices; and, all sovereign acts of a commercial nature affecting the contractor.<sup>378</sup> Thus, despite the use of the language acts of the Government in its "sovereign capacity," there was some question as to whether the clause covered the types of sovereign acts that affected the contractor.<sup>379</sup> The significance here is that the even where the contract attempts to expressly provide a

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<sup>378</sup>79-2 BCA at 68,864.

<sup>379</sup>The Board ultimately concluded that the types of sovereign acts covered by the clause were only those acts of the sovereign affecting commerce. The contractor interpreted the sovereign act language to include any type of sovereign act, not just those affecting commerce. Because the contractor's interpretation was not unreasonable, the court employed the contractor's interpretation and permitted recovery.

clause permitting recovery for the effects of a sovereign act, the scope of that clause may not be "clear." Nevertheless, the case does provide one of the few examples where such a clause was employed.<sup>380</sup>

The second type of price adjustment clause was considered in Landes Oil Co.<sup>381</sup> In that case the clause provided "for upward and downward price adjustment based on the actions of the 'reference price'." The reference price was based upon the quoted price for unleaded gasoline as published in a trade journal. When the Government deregulated the price of gasoline, the price of unleaded gasoline increased. Despite the sovereign act of deregulating fuel prices,<sup>382</sup> which precipitated the increase in performance costs, an adjustment in contract price was permitted. It was the independent nature of the clause that permitted recovery. The clause provided for recovery if there was a change in the reference price, regardless of the underlying reason for the change. Thus, adjustment clauses that are tied to other than governmental acts render the sovereign acts doctrine irrelevant for purposes of entitlement to compensation for the increased costs of performance.<sup>383</sup>

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<sup>380</sup>A similar type clause permitting a price adjustment for the sovereign acts of a foreign sovereign was used in Northrop Corp., ASBCA No. 31186, 88-3 BCA para. 20,915 (1988).

<sup>381</sup>ASBCA No. 22101, 78-1 BCA para. 12,910 (1977).

<sup>382</sup>See cases cited supra, note 180, regarding governmental nonliability for the sovereign act of deregulating fuel prices.

<sup>383</sup>Cf., Pan American Optical Co., ASBCA Nos. 17383, 17391, 17397-17406, 17558-17560, 17569, 18135-18138, 74-1 BCA para. 10,566 (1974) (additional work required of military concessioner

## 2. SUSPENSION OF WORK CLAUSES

Generally, a contractor's losses from stop-work or suspensions of work orders,<sup>384</sup> precipitated solely<sup>385</sup> by sovereign acts are not recoverable.<sup>386</sup> The standard FAR clauses, which permit recovery for acts of the contracting officer, address only contractual acts.<sup>387</sup> Notwithstanding this general rule and

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was product of sovereign act, but price adjustment permitted because the requirement was an unforeseen occurrence that otherwise gave rise to an adjustment as provided for in the contract).

<sup>384</sup>The terms stop-work and suspension of work relate to construction contracts and supply and service contracts, respectively. Hereinafter the term suspension or suspension of work will be used to include both.

<sup>385</sup>Where there exists another basis upon which to grant relief, the courts and boards have not hesitated to do so. See, e.g., Garcia Concrete, Inc., ASBCA No. 78-105-4, 82-2 BCA para. 16,046 (1982) (Government's failure to act with due diligence was reason for suspension). Also see supra Section IV(A), regarding Government violation of implied duties under the contract. Again see, e.g., Varaburn Ltd., ASBCA No. 22177, 82-1 BCA para. 15,744 (1982) (denial of access road constituted constructive suspension for which Government impliedly promised to compensate). Also see infra Section IV(C), regarding implied promises to compensate in the event of a sovereign act.

<sup>386</sup>See, e.g., Port Arthur Towing Co., ASBCA No. 37516, 90-2 BCA para. 22,857 (1990), aff'd sub. nom., Port Arthur Towing Co. v. Dept. of Defense, \_\_\_ F. Supp. \_\_\_, 1991 U.S. Dist. Lexis 9456 (1991); T.L. James & Co., ENG BCA No. 5550, 89-2 BCA para. 21,643 (1989) (Sovereign acts doctrine prevents recovery under suspension of work clause for effects of sovereign act). But see, Empire Gas Engineering Co. supra note 94 and its progeny, supra note 252, in which the ASBCA has held, effectively, that all suspension of work orders issued by the contracting officer, irrespective of the underlying basis for the order, constitute contractual acts for which recovery is permitted under the suspension clause.

<sup>387</sup>See, e.g., FAR 52.212-12 limiting damages to those resulting from unreasonable delays of the contracting officer in the administration of the contract. Thus, the language excludes the acts of other than the contracting officer and for any action taken in a sovereign capacity. Also see FAR 52.212-13

application of the standard clauses, recovery has been allowed where the language of a suspension-type clause indicated a clear intention on the part of the Government to reimburse a contractor for the effects of a sovereign act.

Such a clause was present in Hill Brothers Construction Co.<sup>388</sup> The facts of that case are analogous to those of Port Arthur Towing,<sup>389</sup> with the exception of a "Protest After Award" clause.<sup>390</sup> Hill Brothers had been awarded a construction contract. Prior to the Government's issuance of notice to proceed, an award protest was filed and the Government withheld the notice to proceed.<sup>391</sup> Under the Competition in Contracting Act (CICA), performance of the contract would have to be stayed until determined otherwise by the agency head or the protest was

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for "Stop-Work Order[s]," providing for an equitable adjustment for any increase in cost associated with such orders relating to contractual acts. Again see E.V. Lane Corp., ASBCA Nos. 9741, 9920 and 9933, 65-2 BCA para. 5076 (1965) aff'd in part and modified in part, 66-1 BCA para. 5472 (1966). There the Board, interpreting language similar to that contained in the current standard clauses concluded "suspensions, delays or interruptions caused by the general acts of the Government in carrying on functions governmental in their nature are not covered by the clause." 65-2 BCA, at 23,894-95.

<sup>388</sup> Supra note 369.

<sup>389</sup> Supra note 386.

<sup>390</sup> The facts do not specify that the standard FAR clause was used, but the language of the contract clause at issue tends to indicate that the standard clause was contained in the contract. See FAR 52.233-3 ("Protest After Award").

<sup>391</sup> The Board opined "[w]hether the form of [the direction to stop-work] is an affirmative stop-work order or the withholding of the Notice to Proceed, the legal substance and effect are the same." Id. at 116,743.

resolved.<sup>392</sup> The contract contained a Government drafted provision relating to suspension of the contract in the event an award protest was filed. The clause provided that an "equitable adjustment shall be made: (1) if a stop-work order is issued because of a protest after award...." The Government sought summary judgment based upon the status of the stay requirement of CICA as a sovereign act. The Board, in denying the motion, distinguished the decision in Port Arthur Towing by observing:

in the instant case ... a contract provision is included which does provide compensation for the stay of contract performance. The Government is free, in its contractual capacity, to agree to be liable for a sovereign act. \*\*\* [In the instant case it was the] "Protest After Award" provision of the contract, not [CICA that] created the potential liability.<sup>393</sup>

As the Board acknowledged, where the contract specifically provides for recovery, liability flows not from the sovereign act, but rather from a provision in the contract under which the Government agreed to be liable for such effects. This acceptance of liability is unusual and normally is found only impliedly.<sup>394</sup> Furthermore, even where such language is included in the contract, imposition of liability may still be resisted as the latter case clearly reflects.

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<sup>392</sup>31 U.S.C. sec. 3553; Port Arthur Towing Co., supra note 369. Also see supra Section III(C)(1)(a)(ii), regarding the sovereign act protection afforded the stay.

<sup>393</sup>Id. at 116,744 and 116,745. Cf., L.S. Matusek, ENG BCA No. 3080, 72-2 BCA para. 9,625 (1972) (contract provision, coupled with other Government representations, provided for recovery for effects of sovereign act beyond a "short period").

<sup>394</sup>This analysis is analogous to and perhaps underlies the decisions in the area of implied promises to pay for the effects of a sovereign act. See infra Section IV(C).

### C. CHANGES CLAUSES

While there may be room to quibble about whether relief from the effects of a sovereign act is available under the first two types of clauses, at least one board, the Armed Services Board of Contract Appeals, has consistently maintained that "[s]overeign acts are not compensable under the contract Changes clause."<sup>395</sup> Other boards have not been as express about the issue, but the results indicate a similar opinion.<sup>396</sup>

Where relief has been granted under the changes clause, which has occurred very infrequently, the boards' have found that the interfering act, despite the Government's assertion, was not a sovereign act<sup>397</sup> or was violative of a governmental

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<sup>395</sup> Aviation Enterprises, Inc., ASBCA No. 34505, 89-1 BCA para. 21,192 (1988), aff'd on reconsid., 89-3 BCA para. 21,995 (1989). Accord, Pacific Architects & Engineers, Inc., supra note 377; L.G. Whitfield Co., ASBCA Nos. 8136, 8156, 1962 BCA para. 3570 (1962).

<sup>396</sup> See, e.g., Inter-Mountain Photogrammetry, Inc., AGBCA No. 90-125-1, 91-2 BCA para. 23,941 (1991) (DOT policy denying licenses to foreign registered aircraft if American aircraft available did not constitute constructive change to contract); Weaver Construction Co., supra note 372, at 119,183 (contractor "is not entitled to compensation under the "Changes" clause for the monetary effects of sovereign acts"); Martin K. Eby Construction Co., supra note 367 (dismissing appeal because the absence of specific price adjustment provision for a sovereign act prevents recovery under "Changes" clause); Blake Construction Co., GSBCA No. 4118, 75-1 BCA para. 11,278 (1975) (The standard "Changes" clause does not constitute an agreement to compensate contractor for effects of sovereign act); King Fisher Marine Service, Inc., ENG BCA Nos. 3161, 3175, 71-2 BCA para. 9073 (1971) ("Changes" clause is insufficient basis for recovering loss precipitated by sovereign act) (citing Amino Brothers Co. v. United States, supra note 289; J.A. Tobin Construction Co., ENG BCA No. 2753, 67-1 BCA para. 6,307, at 29185 (1967) ("Since the Government was acting in its sovereign capacity there is no liability under the Changes clause").

<sup>397</sup> See, e.g., John M. Bragg, ASBCA No. 9515, 65-2 BCA para.

implied duty,<sup>398</sup> or the Government had otherwise promised to compensate the contractor for the effects of a sovereign act.<sup>399</sup>

### C. PROMISES TO COMPENSATE

If the Government agrees<sup>400</sup> to compensate the contractor for the effects of a sovereign act, the sovereign acts doctrine will not shield the Government from liability for the effects of the act.<sup>401</sup> This agreement may be either express or reasonably implied<sup>402</sup> from the contract documents.<sup>403</sup> The implied promise

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5050 (1965) (extra work required when water diverted by Government constructed ditches constituted constructive change to contract); Walden Landscape Co., *supra* note 289, at 55,074 (Government's refusal to allow use of nearby fill pit, after closing the source of fill contemplated by the contract was arbitrary and capricious and constituted a change compensable under the "Changes" clause).

<sup>398</sup>See, e.g., American International Constructors, Inc., ENG BCA Nos. 3633, 3667, 77-2 BCA para. 12,606 (1977) (Government's failure to exercise control over second contractor violated Government's duty to cooperate and resulted in constructive suspension of work compensable under suspension of work clause); Grunley-Walsh Construction Co., GSBCA No. 2915, 70-2 BCA para. 8505 (1970) (failure to disclose superior knowledge of impending change to safety standards warranted price adjustment under changes clause).

<sup>399</sup>See, e.g., Old Dominion Security, ASBCA No. 40062, 91-3 BCA para. 24,173 (1991) (Limit on number of security clearances was contrary to indications of contract and constituted a constructive change).

<sup>400</sup>See Wah Chang Corp. v. United States, *supra* note 282, 151 Ct. Cl. at 48 ("an expression of mere willingness to assist the plaintiff in obtaining payment from the appropriate Government agency" did not constitute an agreement or promise to pay ).

<sup>401</sup>See, e.g., Old Dominion Security, *supra* note 399 (number of security clearances available); D&L Construction Co. v. United States, 185 Ct. Cl. 736, 402 F.2d 990 (1968) (use of access road); Carl W. Linder Co., ENG BCA 3526, 78-1 BCA para. 13,114 (1978) (use of highway).

<sup>402</sup>D&L Construction Co., *supra* note 401.

constitutes a warranty of future conditions,<sup>404</sup> and, in at least one case, vitiated the protection of the sovereign acts doctrine despite the fact that the interfering agency was not a party to the contract.<sup>405</sup> Promises to compensate generally have been found in the context of the availability of access roads to work sites, but have arisen in other situations as well.

#### **1. AVAILABILITY OF ACCESS ROADS TO WORK SITE**

Where the contract either specifies a particular route of ingress and egress or guarantees the contractor "suitable access" to the work site, the courts and boards will imply a promise to pay in the event a sovereign act renders the routes unavailable. The former situation is found in Gerhardt F. Meyne Co. v. United States<sup>406</sup>

There, the specification required the contractor to use a specific gate for entry onto the military installation. Subse-

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<sup>403</sup>United States v. Howard P. Foley, 329 U.S. 64 (1946). Foley appears to require that "the warranty relied upon must be expressly stated in the contract documents." Carl W. Linder, ENG BCA No. 3526, 78-1 BCA para. 13,114 (1978). This standard has apparently been relaxed in that the court and boards are willing to find the warranty if expressly or reasonably implied in the contract documents. See, e.g., D&L Construction Co., supra note 401; Old Dominion Security, supra note 399.

<sup>404</sup>Government Contracts, supra note 367, at 179-86.

<sup>405</sup>See Old Dominion Security, supra note 399 (Contracting agency was U.S. Navy and interfering agency was Defense Investigative Service, an entity not part of the Navy). Because such implied promises are viewed as Government agreements to compensate in the face of a sovereign act, the identity of the interfering actor should be irrelevant. Cf., Saul Freedman v. United States, supra note 339 (sovereign acts doctrine does not relieve Government of liability for acts that it has specifically undertaken).

<sup>406</sup>110 Ct. Cl. 527, 76 F. Supp. 811 (1948).

quent to award, the base commander ordered the gate closed to all traffic.<sup>407</sup> Plaintiff was forced to construct a temporary road to gain access to the work site and filed a claim for the increased costs associated with the construction. Citing United States v. Bostwick<sup>408</sup> and Sunswick Corporation v. United States,<sup>409</sup> the court concluded that the direction to use a specific gate constituted a warranty that the gate would be available.<sup>410</sup> The warranty carried with it an implied promise to pay in the event it was breached.<sup>411</sup>

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<sup>407</sup>While the court did not expressly address the order of the base commander in terms of a sovereign act, there appears to be little question that orders regulating access and traffic control constitute sovereign acts. See Nero And Associates, Inc., ASBCA No. 30369, 86-1 BCA para. 18,579, at 93,296 (1985) ("Regulations relating to vehicular traffic on military installations have been held to constitute sovereign acts precluding relief for increased costs associated with compliance. Hallman v. United States, 107 Ct. Cl. 555 (1946)").

<sup>408</sup>94 U.S. 53, 69 (1877).

<sup>409</sup>109 Ct. Cl. 772, 75 F. Supp. 221, cert. denied, 334 U.S. 827 (1948).

<sup>410</sup>Compare Premier Electrical Construction Co. v. United States, 473 F.2d 1372 (7th Cir. 1973). There the specified access route was rendered impassable because of an early thaw. The court refused to apply the analysis of Meyne and a warranty of future conditions, because the act denying use of the specified road was not a sovereign act. Such a result could only be predicated upon the principle that implied warranties afford relief only where the breach is the result of a sovereign act. Such a limitation does not seem to exist, because the implied warranties exist independent of the sovereign acts doctrine. See, e.g., cases cited infra at note 421, where an implied warranty was found in activities having no relation to the sovereign acts doctrine.

<sup>411</sup>See Dale Construction Co. v. United States, 168 Ct. Cl. 692, 699 (1965) ("[A] warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue").

In D&L Construction Co. v. United States,<sup>412</sup> there was no particular route of access specified, but the court employed the analysis of Meyne. The contract was for construction of housing on a military installation. The contract documents contained a small vicinity map depicting three main roads in the vicinity of the installation. On the date the contract was executed, the contracting officer sent a letter to the field office of the Federal Housing Administration (FHA), with a copy to the contractor. The letter assured the contractor that suitable access roads would be made available and properly maintained. The contractor had been and continued to be involved in a labor dispute with a local union. The union notified the base commander that the union intended to place pickets at all entrance gates onto the military installation. The commander notified the contractor that a different access route would have to be used by the contractor's personnel. The contractor protested the new route and maintained that the new route would greatly increase costs.<sup>413</sup> The contractor demanded that the routes available when the contract bid was submitted be made available. The commander denied the request and the contractor filed a claim for the increased costs, which was denied by the contracting officer.

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<sup>412</sup>Supra note 401.

<sup>413</sup>Cf., Mountain Fir Lumber Co., Comp. Gen. Dec. B-186534, 76-2 CPD para. 150 (1976) (because the contract authorized use of particular road and the value of timber was calculated using this least expensive route, the Comptroller General determined that the contract warranted that the road would be available).

The court found that the representations of the map, bolstered by the letter to the FHA, "warranted that there would be 'suitable access' to the project during the construction period."<sup>414</sup> This warranty was violated when the main routes depicted on the map and originally used by the contractor were denied him by the order of the base commander.<sup>415</sup> Thus, in both cases the implied promise to pay for breaching the warranty overrode the protection afforded sovereign acts under the doctrine. While the initial application of the implied promise to pay was in access route availability cases, the warranty has not been limited to that situation.

## 2. OTHER SITUATIONS FINDING IMPLIED PROMISES TO PAY

Generally, where the Government has represented certain facts in the contract documents, the sovereign acts doctrine will not afford protection to the effects of a sovereign act that are contrary to those representations.<sup>416</sup> These repre-

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<sup>414</sup>185 Ct. Cl. at 753.

<sup>415</sup>Cf., Swinging Hoedads, AGBCA 77-212, 79-1 BCA para. 13,859 (1979) (maps depicting side roads would be available for contractor's use constituted warranty that was breached when the roads were barricaded).

<sup>416</sup>This result is apparently contrary to the general rule applicable to work site availability, where Government representations that the work site will be available on a certain date do not constitute a warranties. See, e.g., H.E. Crook Co. v. United States, 270 U.S. 4 (1926) and United States v. Rice, 317 U.S. 61 (1942). In both cases the Government had represented the approximate date upon which the previous contractor, upon whose performance the instant contractor depended, would be finished. The Court held that the Government had not bound itself to make the site available to the contractor by the date represented. The situation may be changing. See Erickson Air Crane Co., EBCA 50-6-79, 83-1 BCA para. 16,145 (1982), aff'd, 731 F.2d 810 (Fed. Cir. 1984). There the Government represented

sentations have arisen vis-a-vis periods of time and the availability of security clearances.

**a. REPRESENTATIONS REGARDING TIME**

When the Government represents that an act will be limited to or performed within a specific period of time and then exceeds this limitation, the sovereign acts doctrine will not afford protection against the damages incurred by the contractor. In L.S. Matusek,<sup>417</sup> a road construction contract, the contract provided that, due to the threat of fire, "the Contractor's operations may be shut down for short periods" during hazardous weather conditions.<sup>418</sup> Historically, as represented by the Government, such shut downs occurred for average periods of up to three days. In this case the shut down lasted for 27 days. Initially, the Board concluded that the shut down was a sovereign act. The Board determined that the average length of previous shut-downs constituted "a positive

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to the contractor that the right of way, upon which the contract was to be performed, would be available by a specific date. The Government's subsequent failure to make the site available was held to violate the express warranty manifested by including in the contract a specific date for site availability. See also Dravo Corp., ENG BCA No. 3800, 79-1 BCA para. 13,575 (1978) (Government warranted availability of a disposal site since the contract specified a completion date which could be achieved only if a disposal site was designated). An explanation for the conflict between the site availability cases and the site access cases may lie in the degree of control the Government has in the two situations. Arguably, in the site availability cases the availability is dependent upon a second contractor, while in the site access cases the Government's own actions rendered access more difficult and hence more costly.

<sup>417</sup>ENG BCA No. 3080, 72-2 BCA para. 9,625 (1972).

<sup>418</sup>Id. at 44, 964 (emphasis added).

representation" of the length of shut downs for which the Government was not liable. The Board concluded:

[w]hile it was the Government in its sovereign capacity that initiated the close-down and kept it in effect..., it was the Government as a contractor that represented the work stoppage would be short. When the stoppage continued beyond a short period the Government, as contractor, was under a duty to order a suspension of work [for which a price adjustment was required].<sup>419</sup>

In other words, the Board agreed that the shut down was a sovereign act, but the Government's representations amounted to an implied promise to compensate the contractor for the effects of the sovereign act beyond the period represented.<sup>420</sup>

Government representations regarding time were also the basis for the decision in Swinerton & Belvoir.<sup>421</sup> The contract was for the construction and restoration of buildings at an American Air Force Base on Guam. At the time of bidding there was a shortage of U.S. workers on Guam. The specifications accompanying the Invitation for Bids informed potential bidders that "clearance for alien [workers] may require up to 90 days." Subsequent to award the Immigration and Naturalization Service and Department of Labor amended their procedures regarding clearance and work permits for alien workers on Guam. The time

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<sup>419</sup>Id. at 44,966.

<sup>420</sup>While the board did not expressly state that the representation constituted a warranty, its reliance upon Gerhardt F. Meyne Co v. United States, supra note 371, indicates that the result was based upon the breach of the implied warranty of a future condition.

<sup>421</sup>ASBCA No. 24022, 81-1 BCA para. 15,156 (1981).

involved in processing the alien work permits under the new procedures ranged from 110 to 120 days. The delays beyond 90 days precipitated additional costs to the contractor. He filed a claim seeking recovery of the additional costs. The Government defended on the basis of the sovereign acts doctrine.

The Board acknowledged that the alien clearance procedures constituted sovereign acts. The Board opined, however, that there was no reasonable distinction between the 90 day limit for processing the alien clearances in this case and "the representation in D&L [Construction Co.] and Meyne that certain access roads, subsequently closed by military authorities, would be open."<sup>422</sup> Applying this analogy, the Board's decision reflects that the Government's representation, that the clearance process could take up to 90 days, constituted an implied warranty the process would not exceed 90 days. From this the Board found an implied promise to compensate the contractor for effects of the clearing process beyond 90 days.<sup>423</sup>

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<sup>422</sup>Id. at 74,988.

<sup>423</sup>But see Hawaiian Dredging & Construction Co., ASBCA No. 25,594, 84-2 BCA para. 17,290 (1984), where the same board held that the increased processing time was a sovereign act for which the Government was not liable. The results in Hawaiian Dredging are distinguishable in that the 90 day limit clause was not in the contract. In dicta, however, the Board noted that even if the 90 day limit had been included, the 90 day limit would not have constituted a warranty by the Government. See supra text following note 211. The holding in Swinerton & Belvoir represents the better reasoned result, at least where the representation is relied on by the contractor in formulating his bid. Absent such responsibility, the Government would be able to make such representations willy nilly with the contractor formulating his bid based upon the representation only to find the representation was not binding but his bid price is. Cf., Peter Kiewit Sons' Co. v. United States, supra note 327 ("Government may not,

## 2. REPRESENTATIONS OF THE AVAILABILITY OF RESOURCES

At least one board has held that where the contract documents imply that sufficient particular items or resources will be available to perform the work, the Government will be responsible for the damages suffered by the contractor when additional expense is incurred because of the absence of such resources. While only one case has been decided, in which an implied promise served to overcome the protection afforded by the sovereign acts doctrine,<sup>424</sup> the application merits examination because it probably represents the outer limit of the implied promise rationale vis-a-vis sovereign acts. This conclusion is based upon the nature of the sovereign act and the method by which the board arrived at the existence of the warranty.

In Old Dominion Security<sup>425</sup> the contract was a fixed price lump sum contract to provide security guard services at a

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with impunity, do whatever is in its own best interests regardless of the harm which may be done to its contractor," 168 Ct. Cl. at 675).

<sup>424</sup>The cases in which the court and boards have found this implied promise arise largely outside of the sovereigns acts doctrine. See, e.g., Franklin E. Penny Co. v. United States, 207 Ct. Cl. 842, 524 F.2d 668 (1975) (listing of approved sources constituted a warranty that those sources could produce the item); Parker's Mechanical Constructors, Inc., ASBCA No. 29020, 84-2 BCA para. 17,427 (1984) (listing of specified item warrants its existence); J.W. Bateson Co., ASBCA No. 19823, 76-2 BCA para. 12032, reconsid. denied, 77-1 BCA para. 12,275 (1976) (listing requiring use of "standard product" warranted commercial availability). The analysis employed in these cases is consistent with that employed by the Board in the one sovereign acts case in which such a warranty was found. Old Dominion Security, ASBCA No. 40062, 91-3 BCA para. 24,173 (1991).

<sup>425</sup>Id.

military installation. The IFB "implied" that each 24 hour period would be divided into three shifts of eight hours each.<sup>426</sup> The IFB further identified the number of personnel required to have security clearances on duty during each shift. The Board concluded that by multiplying the number of shifts times the number of security clearances per shift provided the number of clearances that would be made available, thereby avoiding the need for overtime, which was not contemplated in the IFB.<sup>427</sup> Two weeks after contract award, the contracting agency, pursuant to the direction of the Defense Investigative Service (DIS), reduced the number of clearances available to contractor personnel by 10%. The reduced number of clearances necessitated that cleared individuals work overtime to provide the required number of individuals on duty with the necessary clearance. The contractor filed a claim for the increased costs associated with the overtime necessitated by the reduced number of security clearances.

The Government defended that the reduction of the number of security clearances was a sovereign act by a different agency, the DIS, the effects from which the Government was not responsible. The Board agreed that the reduction was a sovereign act, but held that the information in the IFB implied that the Government would compensate the contractor for the effects of such acts. The Board reached this conclusion by

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<sup>426</sup>Id. at 120,917.

<sup>427</sup>Id. at 120,918.

finding that the specific number of security clearances necessary to perform the contract, with the contractor's personnel working only eight hours per day as the contract implied, constituted a representation that a sufficient number of clearances would be available to permit the contractor to perform in this manner.<sup>428</sup> The Board opined that the agreement to compensate need not be express, but could be based upon what the contract reasonably implies.<sup>429</sup> Thus, the implied promise to compensate overcame the protection of the doctrine in one of the clearest areas of sovereign acts, i.e. national security and security classifications,<sup>430</sup> in the scenario where there interfering agency was not a party to the contract.

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<sup>428</sup>Similar rationale was employed by the Court of Claims in American Ensign Van Service v. United States, 220 Ct. Cl. 681, decided by order (1979). There the plaintiff was awarded a contract to transport household goods from the United States to various locations in Korea. When the plaintiff bid upon the contract there were two ports operating in Korea. Subsequent to award, the Commander of Eighth U.S. Army decided to close one of the ports in an effort to save money. The closure necessitated the contractor transport the household goods by land transport from the single remaining port, which resulted in increased costs. The Government unsuccessfully maintained that the closure was a sovereign act. The court, recognizing the basic "unfairness" inherent in the situation, implicitly concluded that the existence of two ports at the time of bidding warranted that the two ports would be available during the performance period. This warranty in turn "created an obligation ... to reimburse the plaintiff for the reasonable value of the extra service" represented by the additional land transport. Id., at 683 (citing Trans Ocean Van Service v. United States, 192 Ct. Cl. 75, 426 F.2d 329 (1970)).

<sup>429</sup>Id. at 120, 918-19 (citing D&L Construction Co., supra note 401 and L.S. Matusek, supra note 359). This standard, under these facts, appears to be as far from the "expressed warranty" requirement, set forth in United States v. Howard P. Foley, supra note 403, as reason would allow.

<sup>430</sup>See discussion supra at note 274.

The nature of implied promises is that they constitute a contractual agreement to compensate. As such, unlike the other factors affecting protection under the doctrine, they operate against the sovereign acts of third parties that interfere with performance. The obligation to pay arises when the warranty of future conditions is breached. While the promise/warranty may be implied, the case law indicates that the implication must be derived from the contract documents.

#### **D. PROXIMATE CAUSE**

In order for the protection of the doctrine to apply, "there must be a nexus between the [sovereign] act of the Government and the damage claimed by the contractor."<sup>431</sup> Thus, the mere existence of a sovereign act will not shield the Government where the contractor's injury was attributable to a Government act other than the sovereign act.<sup>432</sup> In ascertaining whether

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<sup>431</sup>Space Age Engineering, Inc., ASBCA Nos. 25761, 25982, 26020, 26381, 83-2 BCA para. 16,607, at 82,575 (1983). Accord, Ballman Co., ASBCA No. 29476, 88-1 BCA para. 20,473 (1987).; Southeastern Services, Inc., ASBCA No. 21278, 78-2 BCA para. 13,239 (1978); Litcom Division, Litton Systems, ASBCA No. 13,413, 78-1 BCA para. 13,022 (1977); Guenther Manufacturing Co., ASBCA Nos. 15314 and 15315, 73-2 BCA para. 120,259 (1973); Electronic & Missile Facilities, Inc. v. United States, 189 Ct. Cl. 237, 416 F.2d 1345 (1969); Midwest Spray & Coating Co. v. United States, 176 Ct. Cl. 1331 (1966).

<sup>432</sup>See, e.g., Synernet Corp., NASA BCA No. 2898-1, 91-1 BCA para. 23,369 (1990) (denying Government motion for summary judgment) (injury to the contractor resulted from Government's failure to award follow-on contract, as agreed in establishing ceiling rates, not the action of the Small Business Administration); Garcia Concrete, Inc., AGBCA No. 78-105-4, 82-2 BCA para. 16,046 (1982) (Government's failure to obtain required permit in a reasonable time caused injury, not the sovereign act requiring the permit); Constructors-Pamco, ENG BCA No. 3468, 76-2 BCA para. 11,950 (1976) (Contractor injury was the result of Government order to proceed despite the effects of flood control

the sovereign act caused the injury, traditional cause and effect analysis is employed and the decision is a "pure question of fact."<sup>433</sup> Furthermore, where the contract provides for recovery in the event of a sovereign act, the contractor must show the existence of "a direct causal connection between the matter covered by the special provision and an injury sustained by [him]."<sup>434</sup> Thus, not unexpectedly, the causal relationship between the Government's act and the contractor's injury is a necessary predicate to either protection or recovery, as the case may be, where sovereign acts are invoked.

In deciding whether the necessary causal relationship is present, the boards have on occasion drawn an exceptionally fine line. An example of such line drawing is seen in The Ballman Co.<sup>435</sup> There, the contract was to paint buildings located on a military installation. Swallows had built nests in many of the buildings. A treaty between the United States and Canada had declared the swallows an endangered species, mandating that the nests not be disturbed. Initially, the contractor was instructed

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operation, without being granted an extension of time, not the sovereign act of operating the flood control dam); M.D. Funk, ASBCA No. 20287, 76-2 BCA para. 12,120 (1976) (Contractor's operation affected by two sovereign acts, control of materials and control of prices, but injury due to Government's unreasonable delay in obtaining the controlled materials).

<sup>433</sup>Pacific Architects & Engineers, Inc., supra note 377 (citing Prosser on Torts, Chapter 8, Section 46, p. 321 and Electronic & Missile Facilities, Inc. v. United States, supra note 431).

<sup>434</sup>Space Age Engineering, Inc., supra note 431, at 82,575 (quoting Pacific Architects & Engineers, Inc., supra note 377).

<sup>435</sup>Supra note 431.

to spray paint around the nests. Subsequently, the contracting officer instructed the contractor to hand paint around the nests, which was more time consuming than spraying, because paint was being sprayed on the nests.

The contractor sought recovery of the additional costs it incurred in hand painting around the nests. The Government's defense was that the necessity for hand painting resulting from the need to protect the nests, which was mandated by the treaty, a sovereign act. Without providing analysis or an acceptable alternative as to how the treaty could have been complied with absent the instruction to hand paint the affected areas, the Board concluded "[a] treaty prohibiting the removal of the nests did not impose any obligation upon [the contractor] to perform extra painting effort at its own expense."<sup>436</sup>

This result is analogous to that of Empire Gas,<sup>437</sup> in that the focus is on the final act that caused the injury, rather than the act that precipitated the contracting officer's direction. The Board, by failing to discuss other possible courses of action, in effect, decided that the reasonable actions to effectuate a sovereign act may not relieve the Government for responsibility of injury. If limited to this focus, the result is obviously troubling.<sup>438</sup> At the same time, however, consid-

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<sup>436</sup> Id. at 103,551. There is little question that the contractor was charged with constructive knowledge of the treaty as a federal law. Cf. T.L. James Co., Inc., supra note 292 (information in public domain is constructively known by contractor).

<sup>437</sup> See supra note 249 and accompanying text.

<sup>438</sup> The trouble in this area is identifying the ultimate

ering that the direction was solely directed to the instant contract and was the product of the contracting officer, the result is not inconsistent with the analysis generally applied by the courts and boards.<sup>439</sup>

Because the finding of a causal relationship is a question of fact, each case must be decided individually. This individual consideration lends itself to a better approach, aligned with the purposes of the doctrine. Determinations of a causal relationship should be made by focusing not upon the immediately interfering act, but upon the entire course of acts that precipitated the injury. This approach would render protection available if the sole cause of the interfering act was to effectuate an otherwise sovereign act.<sup>440</sup> This approach would focus upon the causal relationship between the act in question and the resultant injury, irrespective of the identity of the actor and nature of the final direction. These latter considerations

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source of the interference. In an effort to avoid this quagmire, at least the board in Ballman, appears to have drawn an artificial line, looking no further than the act that immediately caused the injury.

<sup>439</sup>The one question that is presented and unresolved is how the government is to effectuate the mandates of a particular sovereign act, and remain within the protection of the doctrine, where the effect of such an act has an unique application that does not warrant the promulgation of regulations concerning the act. In such cases it seems unreasonable to simply conclude that all such acts constitute contractual acts. The Board's reasoning in Ballman again reflects the primacy of the elements at the expense of the nature of the act that precipitated the interfering act of the contracting officer.

<sup>440</sup>Cf., supra Sections II(C)(2)(a)(ii) and (b)(ii), regarding the protection afforded both the contracting agency and contracting officer, respectively, where their actions serve as mere conduits.

could be addressed through application of the elements of the doctrine and the other limitations placed upon the Government's actions.

While the question of proximate cause addresses the relationship between the sovereign act and the contractor's injury, the last group of factors are concerned with the method by which the contracting agency chooses to implement the dictates of the sovereign act.

#### **E. LEGAL ACTS**

For a governmental act to be entitled to protection under the doctrine the act in question, in addition to the other requirements discussed above, must be "legal".<sup>441</sup> Whether the act in question complies with this requirement hinges upon the basis for the act. The Court of Claims has opined that "when the Government, without justification in statute, executive order, administrative discretion or otherwise" engages in conduct that violates an implied or express contractual obligation, the Government's status as a sovereign will not protect it from liability.<sup>442</sup> In order for the act in question to be legal, the authority for the act must be derived from one of these

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<sup>441</sup>O'Neill v. United States, 231 Ct. Cl. 823 (1982) (overruling defendant's motion for summary judgment) (citing Ottinger v. United States, 116 Ct. Cl. 282, 285, 88 F. Supp. 881, 883 (1950) and Wah Chang Corp. v. United States, *supra* note 282, 151 Ct. Cl. at 51. Also see Alger-Rau, Inc. v. United States, 109 Ct. Cl. 846 (1948).

<sup>442</sup>Ottinger v. United States, *supra* note 441, 116 Ct. Cl. at 285.

bases.<sup>443</sup>

At the same time, the concept of legality requires that the act not be discriminatory<sup>444</sup> nor arbitrary and capricious.<sup>445</sup> Given the latitude inherent in such standards, this factor is seldom employed to eviscerate the protection of the doctrine.<sup>446</sup> Nevertheless, this factor has been applied in unique cases where the Government's actions were blatantly discriminatory or without any reasonable basis.

### 1. NONDISCRIMINATORY ACT

The clearest example of discriminatory conduct is seen in Leavitt v. United States.<sup>447</sup> There the plaintiff had purchased 2.5 million pounds of post-war surplus bacon. Governmental officers had lured potential customers away from the plaintiff by selling bacon at a lower price. Before Leavitt could otherwise dispose of the bacon he had purchased, he was indicted by a federal grand jury for hoarding the bacon that he had pur-

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<sup>443</sup>O'Neill v. United States, supra note 441.

<sup>444</sup>Clemmer Construction Co. v. United States, 108 Ct. Cl. 718, 721-22 (1947); Froemming Brothers, Inc. v. United States, 108 Ct. Cl. 193, 213 (1947). Cf., Penn v. Schlesinger, 490 F.2d 700 (1973) (Federal officials not acting for sovereign when acting in racially discriminatory manner).

<sup>445</sup>Weaver Construction Co., supra note 372; Sun Oil Co. v. United States, 215 Ct. Cl. 716, 768 (1978); Walden Landscape Co., supra note 289; Ottinger v. United States, supra note 441.

<sup>446</sup>In fact in the case upon which the arbitrary and capricious standard is based, Ottinger v. United States, supra note 441, it was found, upon subsequent hearing, that the conduct of the Government agent "was not so arbitrary and unreasonable as to render it illegal." Ottinger v. United States, 123 Ct. Cl. 23, 48 (1952).

<sup>447</sup>60 Ct. Cl. 952 (1925).

chased from the Government, but had not yet sold. After three indictments had been returned and dismissed, a fourth indictment was entered. Leavitt was tried and acquitted under that final indictment. By the time that Leavitt was able to sell<sup>448</sup> the bacon, the market had dropped significantly and Leavitt incurred a substantial loss. Based upon an admission by the United States Attorney General,<sup>449</sup> the court found that the indictments were based upon an "utter lack of probable cause." Because of the nature of the conduct involved in this fiasco, the sovereign acts doctrine did not shield the Government from liability. Judging from the intentional nature of the conduct warranting a finding of discrimination, it is understandable why discrimination is so seldom a basis for denying protection to a governmental act.<sup>450</sup>

## **2. NOT ARBITRARY AND CAPRICIOUS**

The second type of conduct that qualifies as illegal and vitiates the protection of the doctrine is governmental conduct that is arbitrary and capricious. Because this conduct is not as blatant as the discriminatory conduct it is encountered

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<sup>448</sup>It appears that while Leavitt was fighting the indictments another federal court ordered the bacon seized pursuant to another wartime emergency, and sovereign, act, the Leaver Act.

<sup>449</sup>33 Op. Att'y Gen. 69.

<sup>450</sup>A less egregious, but no less discriminatory, type of conduct was mentioned in dicta in Froemming Brothers, Inc. v. United States, supra note 444. There the conduct was alleged to have been the intentional discrimination in the operation of a government priority allocation system. The court noted that if such conduct was in fact occurring it would deny protection to an otherwise protected sovereign act.

somewhat more frequently, but only relatively so. This conduct is found where the putative sovereign act is taken without an underlying reasonable justification.<sup>451</sup> An example of such conduct is found in Walden Landscape Co.<sup>452</sup>

In that case a Government agent denied the contractor a fill dirt source adjacent to the construction site after the original fill source was closed by the city. The Board examined the facts and determined that there was no logical reason for the denial. The absence of a reasonable explanation for such a denial was found by the Board to constitute an arbitrary and capricious act for which the Government was not entitled to protection under the doctrine. The apparent rationale underlying this determination is that the doctrine only protects the necessary acts of the sovereign. Where this necessity is not shown,<sup>453</sup> protection will not be afforded.

#### **F. ALTERNATIVE COURSE OF ACTION**

Another factor, which is closely related to the legality factor, is the apparent requirement that the doctrine will not

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<sup>451</sup>See Speidel, supra note 281, at 540-42.

<sup>452</sup>Supra note 289.

<sup>453</sup>Cf., Weaver Construction Co., DOT BCA No. 2034, 91-2 BCA para. 23,800 (1990) (denying Government motion for summary judgment based upon sovereign act defense). There the fire closure order permitted a waiver of the order for contractors who were to perform in "low risk" areas of the forest. The contractor was to perform in such an area and sought a waiver based upon that fact. In a footnote, the Board observed that the Government "completely ignored" this fact. While not pursuing this aspect of the case further, the Board clearly implied that if the Government failed to grant a waiver without considering the availability of a waiver under such circumstances, the denial of a waiver was arbitrary and capricious. Id., at 119,183 n.4.

apply where there was an alternative course of action available to the Government by which the needs of the Government could be met without interfering with its obligations to the contractor.<sup>454</sup> In his dissent in Air Terminal Services, Inc.,<sup>455</sup> Chief Judge Jones summarized the basis for this principle when he observed:

The question is not whether the Government may perform an essential sovereign act. That is conceded. The question here is whether there was sufficient necessity for the particular act to justify the Government interfering with the successful operation of its own contract without any adjustment of damages caused to one of its own citizens, who was the other party to the contract.

When the Government enters into a contract it should carry out its terms in good faith, and invoke its great power of a sovereign act when and only when and to the extent necessary to carry out its essential governmental functions.<sup>456</sup>

This formulation reveals that the principle requiring an alternative course of action, where one is available, is inextricably linked to the concept of justification<sup>457</sup> and necessity which underlies the purpose of the sovereign acts doctrine.<sup>458</sup>

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<sup>454</sup>Id. (citing Miller v. United States, 135 Ct. Cl. 1, 10-11 (1956)). Accord, Winstar Corp. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 90-8C, 1992 U.S. Cl. Ct. Lexis 135 at n.15 (April 21, 1992); Freedman v. United States, 162 Ct. Cl. 390, 320 F.2d 359 (1963).

<sup>455</sup>165 Ct. Cl. 525, 330 F.2d 974, cert. denied, 379 U.S. 829 (1964).

<sup>456</sup>165 Ct. Cl. at 538.

<sup>457</sup>See, e.g., California Meat Co., AGBCA No. 76-152, 80-2 BCA para. 14,607 (1980). There, without extended explanation, but employing the justification standard espoused by Chief Judge Jones in Air Terminal Services, the Board found sufficient justification for the sovereign act that rendered the contractor's performance impossible.

<sup>458</sup>As discussed earlier, the purpose of the doctrine is to

This formulation also reflects that the Government's implied duty of good faith and fair dealing, including inter alia the duty to cooperate, is an underlying basis for the requirement that noninterfering alternatives be effected if available.

The one question which has not been expressly addressed is whether the duty to cooperate, which largely has been implied only against the contracting agency,<sup>459</sup> requires that where the sovereign act is directed by a different agency, an alternative course of action must be used if available. The answer to this question is problematic and apparently depends upon the nature of the act. The more clearly the "sovereign" nature of the act in question, the less likely a court or board is to review whether the course of action was necessary.<sup>460</sup>

This conclusion is borne out by the Claims Court decision in Hughes Communications Galaxy, Inc. v. United States.<sup>461</sup> In Hughes, the contractor had entered into a launch services agreement with NASA to launch commercial communications satel-

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allow the Government to take those acts necessary to govern efficaciously. Where a particular course of action is not mandated by the circumstances, it cannot be said to be necessary. Where the course of action is not necessary, justification for such an act is lacking. In view of the Government's obligations of good faith to its contractors, this analysis is particularly apposite to those situations where there exists an alternative course of action available to effect the same goal.

<sup>459</sup>See supra Section IV(A) (2).

<sup>460</sup>Cf., Winstar Corp. v. United States, slip op. at n.15 (in deciding whether an act, directed at less than the general public, is a public and general act, the courts place increased emphasis upon the "compelling 'public' nature of the act").

<sup>461</sup> Cl. Ct. \_\_, No. 91-1032C, slip op. (April 13, 1992).

lites. Following the explosion of the space shuttle Challenger, the President issued an Executive Order limiting shuttle payloads to payloads with national policy purposes or those payloads that could be launched only by the shuttle. Thus, rather than delaying launch dates, which would not have breached the contract, the presidential order precluded certain types of payloads from being launched by the shuttles. Hughes's satellites were of the type eliminated. At trial Hughes asserted that the decision to eliminate certain types of payloads could have been delayed, or impliedly that the remaining shuttles should have been permitted to launch those payloads which were currently under agreement and then implement the ban. Thus, Hughes proposed that an alternative course of action was available to the Government that would allow the fulfillment of its contractual obligations with the remaining assets.<sup>462</sup>

In addressing this argument, the court observed that there were alternative methods available to the Government by which the presidential policy could have been effected without completely breaching the contract with Hughes. The court concluded that while "[a]ny of these options would have been rational[,] ... the process of choosing between them is not a proper subject for this court's inquiry."<sup>463</sup> Instead, the

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<sup>462</sup>The court pointed out that there were practical problems with the Hughes proposal in that in the 21 launches following the implementation of the order only one of the twenty priority commercial payloads had been launched.

<sup>463</sup>Hughes Communications Galaxy, Inc. v. United States, slip op. at 30. In both this case and its companion case, American Satellite Co. v. United States, \_\_ Cl. Ct. \_\_, No. 525-89C, slip

court, without citing authority, simply measured the Government's conduct against the arbitrary and capricious standard. The court found that on its face the decision was not arbitrary and therefore the Government was not liable for the effects of that decision.<sup>464</sup>

Limiting review of the Government's decision to whether that decision was arbitrary is substantially different than ascertaining whether the Government is responsible for the effects of its action for failing to adopt a less onerous alternative. Arguably, such a standard of review vitiates any requirement for the use of an alternative course of action as long as the course chosen is not arbitrary. There is some question as to whether this standard of review is limited to the Claims Court, in view of some boards' position that the actions

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op. at 18 (April 13, 1992), the court went to great lengths to describe the sovereign attributes of the interfering act upon which it based its determination that the act in fact was a sovereign act. A possible rationalization of the failure to consider alternative courses of action may lie in the unquestionably sovereign, as found by the court, nature of the interfering act. This explanation may signal the court's position that the clearer the sovereign nature of the act, the less likely the court is to examine the course of action chosen. If the court declines to examine the chosen course of action, then the issue of alternative courses of action would, in all likelihood, not be addressed. While this result lends nothing to the consistency of application of the doctrine, it does place the sovereign nature of the act above the considerations of the contractual relationship between the parties. Such an approach would permit the sovereign character of the act, rather than the contractual relationship of the parties, to control the result.

<sup>464</sup>The court ultimately concluded that under the contract Hughes had assumed the risk of such acts. Arguably this aspect of the decision renders the discussion regarding the sovereign acts doctrine of limited precedential value. See discussion supra at note 274.

of the Government are "not reviewable as such."<sup>465</sup> Whether this limitation, as espoused by the boards, concerns strictly the wisdom of the Government action, or the equity of that action as well, is uncertain. Where the interfering action is that of the contracting agency, however, the duty of cooperation, appears to require that the courts and boards examine the alternative courses of action available in determining whether that duty has been met. Were this not the case, the duty of cooperation would be an empty obligation and the only restrictions upon governmental actions would be that they not be "illegal." The plethora of case law regarding the duty of cooperation weighs heavily against such a conclusion.

#### **V. REMEDIES BEYOND THE CONTRACT**

The above discussed factors generally limit the scope of protection under the sovereign acts doctrine to those acts which are consistent with the Government's role as a sovereign. Through such limitations on the Government's freedom to operate unilaterally, to the contractor's detriment, the relationship between the Government and its contractors approaches that of its private commercial counterparts. No matter how closely the Government-contractor relationship approximates the one existing between private parties, there will never be complete identity, because of the nature of participants. Where the factors are not applicable and the act is protected under the doctrine, the most drastic result is that the contractor is confronted with an

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<sup>465</sup>See supra note 83 and cases cited there.

noncompensable loss under the contract.

While largely unsuccessful, attempts to overcome this loss have seen the use of various methods beyond the contract. The most frequent theories upon which recovery has been attempted are: (1) "takings" under the Fifth Amendment; (2) congressional reference cases (private bills); and, (3) relief under P.L. 85-804. While these theories are the subject of most of the discussion in this section, two other theories will be briefly addressed: (1) contracts implied in law and (2) an implied duty to compensate for the effects of a sovereign act.<sup>466</sup> Despite the general lack of success in the employment of the foregoing methods, an appreciation of these theories of compensation is necessary to completely understand the doctrine in the realm of government contracting.

#### **A. FIFTH AMENDMENT "TAKINGS"**

Compensation for a sovereign act affecting a Government contract is seldom granted under a taking theory. While there are many specific reasons, they generally relate to the contractual relationship between the parties and the nature of most sovereign acts in the contractual context. Where an entitlement has been found under the Fifth Amendment, the governmental action was not a protected sovereign act and arguably relief could have been, or was, granted under an alternative contract

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<sup>466</sup>The attention devoted to these theories is brief because the former consistently has been unsuccessful and the latter is unproven and proceeds from a somewhat novel interpretation of what constitutes the interfering act vis-a-vis the duty of co-operation.

theory.

### 1. EFFECT OF THE CONTRACT

While the Fifth Amendment provides that private property shall not be taken for public use without just compensation,<sup>467</sup> "interference with contractual rights [generally] gives rise to a breach claim not a taking claim."<sup>468</sup> The latter point results from the consistent decisions of the courts that "the concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract."<sup>469</sup>

It is beyond cavil that contract rights constitute property for purposes of just compensation under the Fifth Amendment.<sup>470</sup>

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<sup>467</sup>Foster v. United States, 2 Cl. Ct. 426, 445-46 (1983).

<sup>468</sup>Sun Oil Co. v. United States, 215 Ct. Cl. 716, 770, 572 F.2d 786 (1978). Such a result places the sovereign acts doctrine clearly at the forefront of the litigation as seen in the fact that many of the cases establishing the limits and applicability of the doctrine were breach of contract cases. Moreover, the Fifth Amendment is "rarely used if the case can be adequately resolved using a contract analysis." Hughes Communication Galaxy, Inc. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 91-1032C, slip op. at 31 n.24 (April 13, 1992). See, e.g. Norcoast Constructors, Inc. v. United States, 201 Ct. Cl. 695, 477 F.2d 929 (1973) (claim for taking of contractor's property not treated as a taking, but as constructive change).

<sup>469</sup>American Satellite Co. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 525-89C, slip op. at 18 (April 13, 1992); Marathon Oil Co. v. United States, 16 Cl. Ct. 332, 338-39 (1989); Sun Oil Co. v. United States, supra note 468, 215 Ct. Cl. at 769; J.J. Henry Co. v. United States, 188 Ct. Cl. 39, 46, 411 F.2d 1246, 1249 (1969); Consolidated Coal Co. v. United States, 60 Ct. Cl. 608 (1925).

<sup>470</sup>Hedstrom Lumber Co. v. United States, 7 Cl. Ct. 16, 27 (1984) (citing Lynch v. United States, 292 U.S. 571 (1934)). Also see American Satellite Co. v. United States, supra note 469 (interest in placement on shuttle manifest pursuant to launch

The contract which creates the property interest, however, also defines the limits of that interest, because the contractor has "no legitimate right to expect more than the contract offer[s]."<sup>471</sup> Thus, where the contract indicates that the contractor expressly assumes the risk or where the assumption of risk is implied against the contractor, the nature of the property interest is quite limited.<sup>472</sup>

Even where a sufficient property interest is present "not every deprivation of use, possession or control of property is a taking. One must look to the character and extent of any interference with property rights whenever a taking claim is asserted."<sup>473</sup> In order to constitute a taking a "seizure, use, physical destruction of property or an interference so substantial as to amount to the same thing must be shown."<sup>474</sup> Under

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services agreement); Wah Chang v. United States, 151 Ct. Cl. 41, 282 F.2d 728 (1960) (seizure of pier for military purposes); Miller v. United States, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956) (cancellation of contract for the sale of surplus property); Turvey v. United States, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953) (embargo on exportation of surplus equipment).

<sup>471</sup>Hughes Communication Galaxy, Inc. v. United States, supra note 468, slip op. at 31. Also cf., F.H.A. v. Darlington, Inc., 358 U.S. 84 (1958) where the court held that the lack of clarity in the legislation prevented the existence of a property interest.

<sup>472</sup>Id. Cf., F.H.A. v. Darlington, Inc., supra note 471, where the Court opined "[t]hose who do business in the regulated field cannot object if the legislative scheme is [changed]."

<sup>473</sup>American Satellite Co. v. United States, supra note 469, slip op. at 19.

<sup>474</sup>Latham, The Sovereign Act Doctrine In The Law Of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 28, 51-52 (1975) (citing Jacobs v. United States, 290 U.S. 13 (1933);

this analysis the fact that performance is rendered more expensive, as is the case in many sovereign act situations, is insufficient to constitute a taking.<sup>475</sup> Where performance has been rendered moot, thus depriving the contractor of the benefit of the contract altogether, the issue will revolve around whether the effect was precipitated by an intentional taking or as the result of an exercise of governmental police or regulatory powers.

## **2. NATURE OF CONTRACT RELATED SOVEREIGN ACTS**

A second fact weighing against recovery under a taking theory is that in most protected sovereign act situations the interference with performance of the Government contract is indirect and the result of an exercise of governmental police or regulatory powers. To constitute a compensable taking under the Fifth Amendment the seizure, etc., must be the result of an

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Finks v. United States, 395 F.2d 999 (Ct. Cl.), cert. denied, 393 U.S. 960 (1968)). Also see Huerta v. United States, 212 Ct. Cl. 473, 548 F.2d 343 (1977) ("interference with use or possession' of property is essential to a taking claim." Id., 21 Ct. Cl. at 484, quoting Eyherabide v. United States, 170 Ct. Cl. 598, 601, 345 F.2d 565, 567 (1965)).

<sup>475</sup>See, e.g., Morrisdale Coal Co. v. United States, 259 U.S. 188, 190 (1922) (The making of a rule regarding the acquisition of coal was not a taking and "no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands). Also see Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir.), cert. denied, 111 S.Ct. 46 (1990) (imposition of legislation requiring expenditure to remediate health and environmental hazards resulting from its production of uranium under Government contract was not a taking). The loss of potential profits produces similar results. Deltona Corp. v. United States, 228 Ct. Cl. 476, 657 F.2d 1184 (1981), cert. denied, 455 U.S. 1017 (1982); Mount v. United States, 2 Cl. Ct. 717, 720 (1983); Mesa Ranch Partnership v. United States, 2 Cl. Ct. 700, 707 (1983).

intentional act and not merely the consequences of an otherwise indirect act.<sup>476</sup> This requirement extends as far as to preclude recovery for any consequential effects, foreseen or not, beyond the express intent of the act.<sup>477</sup>

In Hedstrom Lumber Co. v. United States,<sup>478</sup> the facts of which were discussed above,<sup>479</sup> the court addressed the issue of a consequential loss in the context of a taking claim following a protected sovereign act. There the contractor alleged that his business was effectively taken as a consequence of the sovereign act that directly terminated his timber contract. In denying compensation for this additional loss the court observed:

If the business was destroyed, the destruction was an unintended incident of the [intended] taking.... The can be no recovery under the Tucker Act if the intention to take is lacking. Temple v. United States, 248 U.S. 121, .... Moreover, the Act did not confer authority to take a business.<sup>480</sup>

Thus, the Supreme Court has interpreted, and the Claims Court has applied, the taking provision of the Fifth Amendment

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<sup>476</sup>Hedstrom Lumber Co. v. United States, 7 Cl. Ct. 16, 28-29 (1984) (citing Mitchell v. United States, 267 U.S. 341 (1925)).

<sup>477</sup>See, e.g. Temple v. United States, 248 U.S. 121 (1917) (destruction of business was unintended effect of taking of land and therefore noncompensable under the fifth amendment). Also see Hedstrom Lumber Co. v. United States, supra note 470 at 29 (applying the analysis of Temple).

<sup>478</sup>Supra note 470.

<sup>479</sup>See supra notes 113-114 and accompanying text.

<sup>480</sup>Id. at 29 (quoting Mitchell v. United States, supra note 476).

as requiring just compensation only for the property that is specifically intended, authorized and acquired, irrespective of the natural-albeit indirect-consequences of the taking.

Finally, the nature of most contract related sovereign acts dictates that they will fall outside of a takings analysis altogether. This conclusion follows from the premise that generally the taking theory is inapposite where the property is acquired by the Government pursuant to the exercise of its regulatory or police power.<sup>481</sup> The fact that most protected sovereign acts have resulted from exercises of the Government's police or regulatory powers<sup>482</sup> is apparent in the formulation of the elements of the doctrine that denies protection of the doctrine to those acts directed at a contractor or contract. Given the requirement that a protected sovereign act affect a contractor only indirectly, logic would dictate rarely, if ever, would such

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<sup>481</sup>See, e.g., New Orleans Public Service, Inc. v. City of New Orleans, 281 U.S. 682, 687 (1930). There the Court, in addressing a putative taking effected by a city regulation, concluded "[i]t is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exercise of the police power is not a taking of property without due process of law."

<sup>482</sup>These powers, like the sovereign acts generally protected by the doctrine, are not directed at a particular contract or individual. Instead the individuals are effected only indirectly as the result the enactment of legislation or the promulgation of regulations. It is for this reason that the classic taking case involves appropriations of real property by the Government. The more the governmental action is distinguishable from the invasions or expropriations of specific property, the more likely the destruction or interference is not a taking. See Atlas Corp. v. United States, supra note 475 at 756. There is, however, a limit even to regulatory interference. If the interference becomes unreasonable then a taking will be found. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

acts amount to a "taking" under the Fifth Amendment.

### 3. TAKINGS FOLLOWING A CONTRACT RELATED SOVEREIGN ACT

The Claims Court has opined that the existence of a protected sovereign act is not dispositive of the taking issue.<sup>483</sup> Thus, "even if the sovereign act defense is properly invoked as a defense to a contract action, the action may nevertheless be subject to a takings analysis."<sup>484</sup> Reviewing the case laws reveals that while this conclusion is theoretically correct,<sup>485</sup>

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<sup>483</sup>See Hughes Communication Galaxy, Inc. v. United States, supra note 468 at 30-31. There the Government asserted that the "sovereign act defense not only bars breach claims, but also taking claims." The court rejected this assertion, but held that there was no taking of property because the contractor's property interest was too limited.

<sup>484</sup>American Satellite Co. v. United States, supra note 469, slip op. at 18 n.20. In the court's earlier decision in this case, American Satellite Co. v. United States, 20 Cl. Ct. 710 (1990), it had left open the possibility that despite the invocation of the sovereign acts doctrine the possibility existed for recovery under a taking theory. In its final decision, however, the court found that plaintiff had assumed the risk of a sovereign act and therefore had an insufficient property interest to support a deprivation claim under the Fifth Amendment. The fact that a finding of a sovereign act is not dispositive of a taking claim is borne out by Finks v. United States, 184 Ct. Cl. 480, 359 F.2d 999, cert. denied, 393 U.S. 960 (1968) and Edward P. Stahel & Co. v. United States, 111 Ct. Cl. 682, 78 F. Supp. 800 (1948), cert. denied, 336 U.S. 951 (1949). In the latter case the court opined "the taking property for public use, though unquestionably an act of sovereignty, does not, under our Constitution leave the sovereign immune from having to pay compensation for the taking. The Fifth Amendment expressly imposes liability." Id., 111 Ct. Cl. at 743 (as discussed in Hughes Communications Galaxy, Inc. v. United States, supra note 468, slip op. 30-31).

<sup>485</sup>See, Edward P. Stahel & Co. v. United States, 111 Ct. Cl. 682, 78 F. Supp. 800 (1948), cert. denied, 336 U.S. 951 (1949) (operation of priority of resource allocation system was sovereign act, but the sovereign act did not necessarily preclude compensation under a taking theory).

a successful taking claim has not been found in the face of a protected sovereign act.<sup>486</sup> Instead, the cases in which the courts have found a taking, related to a contract, invariably involved relief being granted under the taking theory in addition to a breach theory or the sovereign act at issue did not qualify for protection under the doctrine.<sup>487</sup>

Thus, despite repeated attempts, efforts to obtain compensation under a Fifth Amendment "taking" theory have proven to be ineffective following a protected sovereign act. This outcome is largely attributable to the different type of government act that the taking theory is designed to redress and the absence of a sufficient "property" interest to warrant relief under the Fifth Amendment. Applying the taking theory to redress a loss relating to most sovereign acts effected in a contractual

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<sup>486</sup>This situation is apparently akin to the Supreme Court of the United States's position that it is possible that estoppel may run against the Government, but a case in which estoppel has been so allowed is yet to be decided. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

<sup>487</sup>See, e.g. Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943) (Contract entered into to deliver mail expressly not funded by Congress constituted a taking for which just compensation was required). Also see Miller v. United States, supra note 470, at 11 where the court, in granting compensation for breach, noted that the Government was also liable under a taking theory. It has also been suggested that where the sovereign act in question is unreasonable a taking may be found. Latham, supra note 474 at 53 (citing Air Terminal Services, Inc. v. United States, 165 Ct. Cl. 525, 330 F.2d 974, cert. denied, 379 U.S. 829 (1964)). In view of the conclusions drawn above, regarding arbitrary and capricious conduct -which would also constitute unreasonable conduct- there is some question whether unreasonable conduct would qualify as a protected sovereign act, rendering recourse to a taking theory unnecessary. See Supra Section IV(E) (2).

context is rather like attempting to fit the proverbial square peg in a round hole. This effect results from the theory's legal principles which, for good or ill, confront head-on the effects of the sovereign acts doctrine. The only way to avoid such conflict is to circumvent the legal principles of the theory and seek recourse under a theory of "fairness."

#### **B. CONGRESSIONAL REFERENCE CASES**

One method by which the sharp corners of the legal principles affecting recovery beyond the contract can be rounded is through the vehicle of a congressional reference case. As such, it provides a vehicle for recovery, despite the legality of the Government's action and the applicability of the sovereign acts doctrine. While the statutory basis for such recovery employs the term "equity", the case law interpreting the statute permits recovery in the interests of fairness. Given the basis for relief and the nature of the sovereign acts doctrine, a contractor's loss caused by a sovereign act, under certain circumstances, lends itself to this route of recovery.<sup>488</sup>

##### **1. STATUTORY VEHICLE FOR RECOVERY**

The Claims Court has jurisdiction to find facts and issue

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<sup>488</sup>Despite this conclusion, the cases reflect that this method is seldom employed by contractors following a loss caused by a sovereign act. A possible explanation for the infrequency of use may be the practical obstacle of enlisting the support of a member of Congress to propose legislation initiating the congressional reference procedure.

an advisory opinion<sup>489</sup> in congressional reference cases pursuant to 28 U.S.C. sec. 1492, which provides a bill "may be referred by either House of Congress to the chief judge of the United States Claims Court for a report in conformity with section 2509 of this title [28 U.S.C. 2509]."<sup>490</sup> While section 1492 vests the court with jurisdiction, section 2509 establishes the procedures and standard under which recovery may be recommended.

That section requires the hearing officer, who is a judge of the Claims Court, to report to the referring house of Congress finding of facts<sup>491</sup> and conclusions regarding any amount "legally or equitably due from the United States to the claimant."<sup>492</sup> One point of significance is that the mere reference of a case to the court does not constitute an

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<sup>489</sup>Historically the vast majority of litigation involving congressional reference cases centered upon the jurisdiction of the former Court of Claims, as an Article III court, to issue advisory opinions. See Glosser, Congressional Reference Cases In The United States Court of Claims: A Historical And Current Perspective, 25 Am. U. L. Rev. 595 (1976) (hereinafter Glosser). Public Law 89-681, 80 Stat. 958 (1966), clarified the issue by vesting only the commissioners of the Court of Claims with the authority to serve as hearing officers and issue advisory opinions. Under the Federal Court Improvements Act, Pub. L. 97-164, 96 Stat. 40 (1982), the United States Claims Court, as an Article I court, has the authority to issue advisory opinions, thus the issue is now largely moot.

<sup>490</sup>There is no requirement that the contractor have exhausted his other remedies prior to seeking relief through the congressional reference vehicle. Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).

<sup>491</sup>The facts are to be determined pursuant to the rules of the court. Such a procedure is practically identical to that applicable to parties litigating legal claims before the court. 28 U.S.C. 2905(b).

<sup>492</sup>28 U.S.C. sec. 2509(c).

admission of liability on the part of the Government.<sup>493</sup> Instead, the effect of a reference to the court merely establishes a forum that otherwise would not exist.<sup>494</sup>

Because the opinions issued by the Claims Court, under its congressional reference jurisdiction, are merely advisory, the Congress is not bound to implement the conclusions of the court. Historically, however, "there has been almost complete agreement by Congress with the court's recommendations."<sup>495</sup> Thus, for practical purposes, if the party seeking relief can persuade the hearing officer that, in the interests of fairness, recovery should be allowed, Congress will enact legislation funding the recovery.

The amount of recovery recommended by the court is appar-

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<sup>493</sup>Bennet, Private Claims Acts And Congressional References, 90th Cong., 2d Sess. 1 (Comm. Print 1968).

<sup>494</sup>Given the nature of reference cases and subsequent recovery, the question that arises is how dependent is this method of recovery upon the political influence of the party seeking compensation? According to surveys of such cases, a "bill's enactment does not depend upon political influence," but instead is a routine matter that is resolved based upon the merits of the particular case. See, Glosser, supra note 489 at 598 n.15 (collecting commentators' surveys). While enactment of the congressional reference is not dependent upon political influence, the contractor must first enlist the support of a member of Congress in order to have the reference bill introduced in Congress. Perhaps it is this requirement that makes litigation under a congressional reference so infrequent.

<sup>495</sup>Glosser, supra note 489 at 627 (citing H.R. Rep. No. 306, 89th Cong., 1st Sess. 3 (1965)). As might be expected, no current information rebutting this historical pattern has been discovered. See S. Rep. No. 1274, 93d Cong., 2d Sess. 5 (1974) and H.R. Rep. 1595, 93d Cong., 2d Sess. 4 (1974) (setting forth the rationale for using the congressional reference procedure).

ently not limited by either the language of the reference from Congress<sup>496</sup> or the amounts originally claimed by the party.<sup>497</sup> Instead, the amount of recovery recommended is dependent upon the amount equitably due to the claimant.<sup>498</sup> While the statutes provide a method of recovery, no recovery will be recommended unless the claimant can establish that he should be permitted to recover.

## **2. STANDARD FOR RECOMMENDING RECOVERY**

A recommendation to permit recovery under a congressional reference case is based upon the Government's "broad responsibility, i.e., what [it] ought to do as a matter of good conscience."<sup>499</sup> Thus, while the statutory language is set forth as permitting recovery as a matter of "equity," that term "is not used in a strict technical sense, meaning a claim involving consideration of principles of right and justice as administered by courts of equity, but in the broader moral sense based upon

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<sup>496</sup>See, e.g., Bechtel v. United States, 198 Ct. Cl. 929 (1972) (recommended amount of recovery exceeded that referred by Congress and subsequently enacted by Pub. L. 93-578, 88 Stat. 1895 (1974)). But see Merchants National Bank of Mobile v. United States, 5 Cl. Ct. 180, 215 (1984), where the court concluded that relief in excess of that authorized in the reference from Congress "would in these circumstances be for the Congress to evaluate."

<sup>497</sup>Burt v. United States, 199 Ct. Cl. 897, 912 (1972)

<sup>498</sup>28 U.S.C. 2509(c).

<sup>499</sup>Clarkson v. United States, 197 Ct. Cl. 963 (1971).

equitable considerations."<sup>500</sup>

While this open-ended fairness doctrine does not require that the Government have done anything "inequitable" to warrant relief, there are cases holding that relief can be granted only where the claimant's loss was the result of a governmental act that was wrongful or negligent.<sup>501</sup> Such a theory ignores the source permitting recovery<sup>502</sup> and the fault requirement has been largely abandoned by the court.<sup>503</sup> Thus, "a wrongful act or

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<sup>500</sup> Merchants National Bank of Mobile v. United States, supra note 496 at 209 (quoting Burkhardt v. United States, 113 Ct. Cl. 658, 667, 84 F. Supp. 553 (1949)). Also see United States v. Realty Co., 163 U.S. 427 (1896) (Congress has authority to create "equitable" debt where no legal debt exists).

<sup>501</sup> See, e.g., B Amusement Co. v. United States, 148 Ct. Cl. 337, 342, 180 F. Supp. 386, 390 (1960) (Government liability in congressional reference case "must rest upon some unjustified act or omission which caused plaintiff's damage"). Accord, Kochendorfer v. United States, 193 Ct. Cl. 1045 (1970); Webb v. United States, 192 Ct. Cl. 925 (1970); Elmers v. United States, 172 Ct. Cl. 226 (1965). The theory for requiring fault by the Government was that, in the absence of fault, the recovery would amount to a gratuity.

<sup>502</sup> See United States v. Realty Co., supra note 500.

<sup>503</sup> See Merchant's National Bank of Mobile v. United States, supra note 496 at 211. Other cases to the same effect are: O'Brien Dieslectric Corp. v. United States, 207 Ct. Cl. 903 (1975); Town of Kure Beach v. United States, 168 Ct. Cl. 597 (1964). The qualification of this abandonment lies in the fact that some judges, notwithstanding the clear language of the court in other cases, still maintain that a wrongful or negligent governmental act must be shown to recommend relief in a congressional reference case. See, e.g., Shane v. United States, 3 Cl. C. 294 (1983) (Yock, Hearing Officer). This insistence is clearly wrong and ignores the reason and the scope of the congressional grant of jurisdiction in such cases. See U.S. Code Cong. & Ad. News 3494 (1966) (where the legislative history of Pub. L. 89-681, granting commissioners of the Court of Claims the authority to issue advisory opinions in congressional reference cases, reflects that Congress was interested in whether relief "ought to be granted", not in legalistic arguments).

omission [by the Government] may be the basis for a decision recommending equitable relief, but it is by no means the only basis.<sup>504</sup> The guiding principle for recovery is whether, in the interests of fairness, the claimant should be allowed to recover, notwithstanding the existence of "one or more extramerititious defenses that accrue to [the Government] by virtue of its sovereign status."<sup>505</sup>

### **3. CONGRESSIONAL REFERENCE FOLLOWING A SOVEREIGN ACT LOSS**

While infrequently attempted, there is little question that losses incurred as a result of a sovereign act can be recovered through a congressional reference case.<sup>506</sup> The fact that there was a prior "legal" proceeding does not proscribe congressional reference. The doctrine of res judicata<sup>507</sup> does not preclude reconsideration of the issue of entitlement to compensation.

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Also see United States v. Realty Co., supra note 500.

<sup>504</sup>Id. Merchant's National Bank of Mobile v. United States, supra note 496 at 211 (emphasis in original).

<sup>505</sup>Burt v. United States, supra note 497 at 906 (emphasis in original).

<sup>506</sup>In fact Burkhardt v. United States, supra note 500, which has been labeled the "bellwether" of the standard of recovery, Town of Kure Beach v. United States, supra note 503 at 623, was a sovereign acts case. There the plaintiff sought to recover losses due to the erection of a dam that was installed pursuant to a flood control plan.

<sup>507</sup>See, e.g., Kochendorfer v. United States, 193 Ct. Cl. 1045 (1970); J.A. Zachariassen & Co. v. United States, 136 Ct. Cl. 63, 141 F. Supp. 908 (1956); Burkhardt v. United States, supra note 500. The theory appears to be that the court lacked the jurisdiction to consider an equitable claim in the course of its normal proceedings and therefore the issue is different than that presented in the earlier "legal" proceedings. See Glosser, supra note 489 at 614 n.129.

While some question exists<sup>508</sup> regarding the binding effect of findings of fact from earlier "legal" proceedings, the court has on occasion disregarded any inconsistency in its findings in a congressional reference case, by opining "[i]f any [of its] findings [in the case at bar] are inconsistent with those of the previous actions between plaintiff and defendant [prior legal suits] ... such a departure from the principles of collateral estoppel is justified [relative to an 'equitable claim']".<sup>509</sup> In congressional reference cases the facts are seldom in issue.<sup>510</sup> Instead, the question is whether, on the facts, should the plaintiff recover in the interests of fairness.

The clearest example of recovery following a sovereign act is seen in Town of Kure Beach v. United States.<sup>511</sup> In that case the town had borrowed money from the Reconstruction Finance Corporation (RFC). The loan was to fund improvements in the town's roads, water and sanitation systems and was to be repaid from municipality taxes. Subsequent to the loan contract, the U.S. Army established a safety buffer around an ammunition dump located near the town that took 40% of the town's property. The buffer did not include, inter alia, the easements for roads and public utilities. The effect of the buffer zone was to deprive

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<sup>508</sup>See Glosser, supra note 489 at 614-15.

<sup>509</sup>Id. at 615 (quoting North Counties Hydro-Electric Co. v. United States, 170 Ct. Cl. 241 (1965)).

<sup>510</sup>Thus, the applicability of collateral estoppel may be more of an academic interest than a practical obstacle.

<sup>511</sup>Supra note 503.

the town of the value of the streets included within the buffer as well as the value of the water and sanitation line improvements in that same area. Finally, the effect of the buffer was to deprive the town of a substantial portion of its tax base. Before the court, the town conceded that it did not have a "legal" claim against the Government but, nevertheless maintained that it was entitled to compensation for the value of the property rendered useless by the buffer and the decrease in the town's tax base. The Government defended against the claim on the basis of the sovereign acts doctrine.

The Government maintained that the sovereign acts doctrine precluded recovery, even under congressional reference jurisdiction, because the doctrine prevented the Government from being held "liable directly or indirectly" in a contractual capacity for its sovereign acts.<sup>512</sup> The court first noted that congressional reference jurisdiction was authorized 18 years after the inception of the sovereign acts doctrine. From this it concluded that Congress intended that the reference not be defeated by the mere existence of the doctrine. Moreover, the court opined "that the exercise of a sovereign function ... does not preclude the satisfaction by Congress of an equitable claim of plaintiff, if it has such a claim."<sup>513</sup> Thus, the existence

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<sup>512</sup>Id., 168 Ct. Cl. at 620 (emphasis in original) (citing Jones v. United States, 1 Ct. Cl. 383 (1965)).

<sup>513</sup>Id., 168 Ct. Cl. at 621 (citing Burkhardt, supra note 500 for the proposition that whether the plaintiff is entitled to be compensated under a congressional reference is a "matter exclusively for the determination of Congress").

of an otherwise protected sovereign act is not dispositive of the recovery issue when the party seeks relief through a congressional reference case.

Given the rationale and scope of relief under a congressional reference case, it appears to be an ideal vehicle for recovery following a protected sovereign act.<sup>514</sup> Because of its focus on fairness, the harsher attributes of the doctrine can be addressed. The situations in which reference cases can provide relief to contractors arise, e.g., where after contract award price controls are lifted and the cost of performance increases considerably or where the contract contained options that are exercised by the Government, following the lifting of price controls, which result in substantial losses to the contractor.<sup>515</sup> While no entitlement exists to such relief, granting this type of relief in furtherance of "fairness" avoids the contempt that naturally follows from what may be considered

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<sup>514</sup>A possible limitation, depending upon the judge assigned as the hearing officer, may be the requirement that relief can be granted only if the claimant can show that the loss was attributable to a wrongful or negligent act by the Government. In most sovereign act cases this will be difficult to show. In the event there is such an act by the Government, recourse to a congressional reference case would not be required to avoid the effects of the sovereign acts doctrine since such acts should not fall within the doctrine's protection. See supra Section IV.

<sup>515</sup>One point to note here is that there is no requirement that each effected contractor seek an individual reference to the court from Congress. "A single congressional reference case may include more than one claimant. Although separate petitions are filed by each individual claimant, all of the claims may be susceptible to 'group case' treatment." Glosser, supra note 489 at 608 (citing as an example J.A. Zachariassen & Co. v. United States, 136 Ct. Cl. 63, 65, 71, 141 F. Supp. 908, 910, 913 (1965)).

sharp practices had they been engaged in by a private party who controlled both the contract and the conduct that adversely affected the contract.<sup>516</sup>

The obvious concerns that such a position produces is that the Government would "lose" the benefit of its bargain or that any compensation under such circumstances would constitute little more than a gratuity. These concerns were not unappreciated by Congress when it enacted the current legislation regarding congressional reference cases. Nevertheless, the congressional reports on the legislation addressed these concerns by stating:

It should be remembered that in the special area with which private relief legislation deals, factors that in other areas ameliorate the possible harsh effects of general laws may not exist. Government officials are understandably unwilling to spend taxpayers' money in situations in which they are not clearly authorized by statute to do so., whereas in a comparable situation a private party might well decide that, although under the law his obligation is not clear, he will pay another person what he feels that equity and fair play dictate that he pay. Conversely, a Government official--despite his personal view of the equities of a particular situation--will be extremely reluctant to fail to press the Government's rights under a general statute, while a private party might decide that in good conscience he should forego what is legally due.<sup>517</sup>

From this language it is clear Congress appreciated the

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<sup>516</sup>Cf., Air Terminal Services, Inc. v. United States, 165 Ct. Cl. 525, 540, 330 F.2d 974, \_\_\_, cert. denied, 379 U.S. 829 (1964) (Jones, C.J. dissenting) (quoting Judge Learned Hand from Heil v. United States, 273 Fed. 729, 731 (1921) to the effect that "honorable" conduct, and hence fairness, should be the guiding principle when the Government deals with its citizens).

<sup>517</sup>Glosser, supra note 489 (quoting S. Rep. No. 1643, 89th Cong., 2d Sess. 4-5 (1966)).

difficulties confronting Government officials when faced with a legal right but an equitable wrong. The congressional reference procedure was instituted to address such situations. Applying it following the effects of a sovereign act furthers the congressional intent that in such situations fairness should be the rule. Thus, despite its infrequent use, congressional reference cases provide an independent method of recovering losses incurred from a sovereign act, if "fairness" dictates such recovery.

**C. EXTRAORDINARY CONTRACTUAL RELIEF: PUB. L. 85-804**

Relief from the effects of a sovereign act is generally not available<sup>518</sup> under public law 85-804.<sup>519</sup> Notwithstanding this general rule, the Army Contract Adjustment Board has acknowledged that relief may be possible<sup>520</sup> and the Air Force Board

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<sup>518</sup>See Arban & Carosi, Inc., ACAB 1191, 3 ECR para. 79 (1976) (removal of wage and price controls); U.S. Forge, Inc., ACAB 1195, 3 ECR para. 82 (1976) (removal of wage and price controls); S.W. Electronics & Manufacturing Corp., NCAB, 2 ECR para. 147 (1971) (embargo of shipments to foreign country); Cheek's Maintenance Service Co., ACAB 1092 2 ECR para. 80 (1969) (increase in minimum wage); R.E. Lee Electric Co., NASACAB, 2 ECR para. 87 (1969) (exercise of priority purchases of copper increased price of copper); Fargo Shipping Corp., NACAB, 2 ECR para. 52 (1969) (military build-up in Viet Nam interfered with and increased cost of performance); Floors Inc., ACAB No. 1043, 1 ECR para. 118 (1962) (increase in minimum wage under Fair Labor Standards Act).

<sup>519</sup>50 U.S.C. sec. 1431 et seq.

<sup>520</sup>Cheek's Maintenance Service Co., supra note 518 (while acknowledging the "possibility" of relief for a sovereign act under 85-804, the board did not grant relief in this case).

has granted relief<sup>521</sup> under Pub. L. 85-804 in the face of a sovereign act.<sup>522</sup> While these examples clearly represent an exception to the general rule, their existence mandates at least a general awareness of the availability of relief under the statute and the nature of this possible method of recovery.<sup>523</sup>

### **1. STATUTORY STANDARD PROVIDING FOR RELIEF**

Public Law 85-804 provides relief in order to facilitate

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<sup>521</sup>Advance Maintenance Corp., AFCAB No. 205, 2 ECR para. 111 (1970); Atlas Coverall and Uniform Supply Co., AFCAB 193, 2 ECR para. 34 (1967).

<sup>522</sup>One commentator has observed that in 1961 the ASPR committee had considered expressly deleting any distinction between granting relief in case of sovereign acts and contractual acts by the Government. "The ASPR Committee, however, was of the opinion that a change for this purpose was unnecessary because the ASPR as ... written did not preclude a CAB from authorizing contractual adjustments in the cases involving a sovereign act of the Government." O'Roark, Extraordinary Contractual Actions In Facilitation Of The National Defense From A Department Of Defense Attorney's Point Of View, 47 Mil. L. Rev. 35, 71 (1970) (hereinafter O'Roark) (citing ASPR Comm. Minutes, 8 Nov. 1961). Given the similarity between the current FAR language and its predecessor, the ASPR, there is little reason for a different result under the FAR. To date, however, there have been no successful 85-804 requests, under the FAR, following a sovereign act.

<sup>523</sup>The treatment of this method of recovery will be very general, largely because the absence of established rules and the limited effect of precedent in such proceedings makes a comprehensive coverage of this subject beyond the scope necessary here. The purpose here is only to apprise the reader of the existence of Pub. L. 85-804 and generally discuss its limited applicability vis-a-vis sovereign acts. In depth discussion and analysis of 85-804 is available in: Richardson, The Use Of The General And Residual Powers Under Pub. L. No. 85-804 In The Department Of Defense, 14 Pub. Cont. L.J. 128 (1983) (hereinafter Richardson); O'Roark, supra note 522 at 49-51; and, Anthony and Vacketta, Background & Explanation [of Extraordinary Contractual relief under Pub. L. 85-804], ECR 1001 (December 1985) (hereinafter Anthony).

the national defense.<sup>524</sup> Thus, if the contractor<sup>525</sup> in question does not fulfill a role that facilitates national defense this method of recovery is not available.<sup>526</sup> With this purpose in mind, the focus is upon benefit to the Government not the contractor, notwithstanding that the contractor benefits from relief.<sup>527</sup> Additionally, recourse to 85-804 is not available until the contractor has exhausted all other administrative remedies.<sup>528</sup> Thus, recovery under 85-804 is available only as a last resort.

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<sup>524</sup>The usage of 85-804 has drastically declined in recent years. See 4 ECR 5005 (1991) (providing statistics revealing that in 1990 there were 31 actions under 85-804, as opposed to 1982 when there were 131 requests for relief). One explanation for this decrease lies in the increased authority of contracting officers to grant relief and the enactment of the Contracts Disputes Act providing jurisdiction to the boards of contract appeals over issues "relating to the contract." See Anthony supra note 523 at 1011.

<sup>525</sup>That the emphasis is upon the contractor, rather than the individual contract, is seen in the fact that even where the loss is incurred in other non-Government related contracts, relief may be granted if the contractor fulfills a role "essential" to the national defense. See, e.g., S.W. Electronics & Manufacturing Corp., NCAB, 2 ECR para. 147 (1971) (relief granted where loss resulted from non-Government work).

<sup>526</sup>The term facilitation of national defense is read broadly, however, and includes even those contracts that affect national defense only tangentially. See, O'Roark, supra note 522 at 49-51. Also see Anthony, supra note 523. See again FAR 50.101 listing agencies whose contracts as a matter of regulation facilitate the national defense.

<sup>527</sup>Bolinders Co. v. United States, 139 Ct. Cl. 677, 153 F. Supp. 381, cert. denied, 355 U.S. 953 (1957) (addressing substantially similar predecessor of Pub. L. 85-804).

<sup>528</sup>FAR 50.102(a). To a similar effect is FAR 50.203 (b) (2) (other agency authority must be deemed lacking or inadequate).

Because the driving factor behind granting relief under this statute is benefit to the Government, the Government has complete discretion in deciding whether to grant relief under the statute.<sup>529</sup> Moreover, denial of such relief is not appealable under the Contracts Disputes Act.<sup>530</sup> These factors lead to the conclusion that relief under 85-804 is entirely dependent upon the support of the contracting agency, because it is the only entity who has the authority to determine whether the relief will facilitate national defense.<sup>531</sup>

## 2. NATURE OF RELIEF

The FAR provides that relief under 85-804 is generally of three types: amendments without consideration;<sup>532</sup> correcting

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<sup>529</sup> Winder Aircraft Corp. v. United States, 188 Ct. Cl. 799, 412 F.2d 1270 (1969).

<sup>530</sup> Vanguard Industrial Corp., ASBCA No. 28361, 84-1 BCA para. 17150 (1984). Nor is the denial otherwise appealable to the BCA's. Tachtronic Instruments, Inc., ASBCA No. 20986, 76-1 BCA para. 11,803 (1975) (Boards have no authority to review denials of relief under Pub. L. 85-804). Accord Cleanco Co., ASBCA No. 12419, 67-2 BCA para. 6,526 (1967). Some question exists as to whether, given the nature of relief, the decision to not grant relief is appealable as an abuse of discretion. See, e.g., Theobald Industries, Inc. v. United States, 126 Ct. Cl. 517, 115 F. Supp. 699 (1953) (court reviewed agency denial of relief under 85-804 predecessor to determine whether the denial constituted an abuse of discretion or was arbitrary or capricious or was so grossly erroneous as to permit an inference of bad faith). The efficacy of an appeal is questionable, however, because the court is powerless to compel granting relief under the act. Evans Reamer & Machine Co. v. United States, 181 Ct. Cl. 539, 386 F.2d 873, cert. denied, 390 U.S. 982 (1967).

<sup>531</sup> The agency determination is generally made by the agency boards of contract adjustment established pursuant to FAR 50.202.

<sup>532</sup> FAR 50.302-1

mistakes;<sup>533</sup> and, formalizing informal commitments.<sup>534</sup> Generally, only the first type of relief would be directly applicable to recovery following a sovereign act.<sup>535</sup> There are two primary bases for recovery under the amendments type relief: the contractor is essential to the national defense,<sup>536</sup> or the loss was the result of Government action.<sup>537</sup> While the former basis may qualify some contractors for relief, that basis would appear to exist and provide a separate basis for relief independent of the sovereign acts situation.<sup>538</sup> On the other hand, in most sovereign act cases there is little question that the act in question was a Government act. Thus, the cases in which the effect of a sovereign act has been discussed invariably involved contractors seeking relief for a Government action.<sup>539</sup>

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<sup>533</sup>FAR 50.302-2.

<sup>534</sup>FAR 50.302-3.

<sup>535</sup>Under these circumstances the contractor would be seeking an amendment in the contract price to cover his losses incurred as a result of the sovereign act.

<sup>536</sup>FAR 50.302-1(a).

<sup>537</sup>FAR 50.302-1(b).

<sup>538</sup>See, e.g., Amron Corp., ACAB 1155, 3 ECR para. 8, ACAB 1155A, 3 ECR para. 12 (1974) (Board refused to grant relief on theory of Government action, but granted relief on basis of essentiality).

<sup>539</sup>See supra note 518 for cases where contractor sought such relief. The difficulty in ascertaining the basis for relief lies in the fact that the boards often fail to specify the basis upon which relief is being granted. In the two cases where relief has been granted, despite the presence of a sovereign act, the relief apparently was granted under the board's residual power. See O'Roark, supra note 522 at 70. Also see Richardson, supra

A third, and rarely used,<sup>540</sup> basis for recovery is under the "residual powers" of the Act.<sup>541</sup> The use of this authority is permitted where "necessary and appropriate, all circumstances considered."<sup>542</sup> Nevertheless, the standards for use of such power, as it currently is outlined in the FAR,<sup>543</sup> tends to indicate that this power is currently authorized only for indemnification of contractors.<sup>544</sup> Such a limitation on using this power, however, represents a departure from its past use.<sup>545</sup>

Under a contractual amendment without consideration, the contractor normally seeks to recover his losses resulting from the Government action; as pertinent here, a sovereign act. Where such recovery is based upon a Government action, the amount of compensation is generally limited to the amount of the contractor's loss measured by the amount of damage suffered as a

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note 523 at 144.

<sup>540</sup>See R. Nash, Jr. & J. Cibinic, Jr., Federal Procurement Law, Vol. II, at 2281 (3d ed. 1980).

<sup>541</sup>FAR Subpart 50.4.

<sup>542</sup>FAR 50.401.

<sup>543</sup>FAR subpart 50.4.

<sup>544</sup>See FAR 50.401, where the section primarily addresses use of the residual power for purposes of indemnification.

<sup>545</sup>See, e.g. Ingalls Shipbuilding Div., Litton Industries, Inc., NCAB, 3 ECR para. 120 (1978) (use of residual power to reform Total Package Procurement contract, where contractor experienced substantial losses).

result of the Government action.<sup>546</sup> Finally, any request for relief must be submitted by the contractor before "all obligations (including final payment) under the contract have been discharged."<sup>547</sup>

The nature of the authority for granting relief under 85-804 is such that each case is decided on its merits, all but ignoring prior precedent.<sup>548</sup> The rationale underlying this approach is that because the needs of national defense change, the resolution of a specific request for relief may not be consistent with past treatment of similar requests. The only real consistency in this area has been the unavailability of relief under 85-804 for losses suffered as a consequence of a sovereign act.

### **3. RELIEF GRANTED DESPITE SOVEREIGN ACT**

Notwithstanding the general rule, relief has been granted

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<sup>546</sup>See, e.g. Medico Industries, Inc., ACAB 1181, 3 ECR para. 62 (1975) (increased in actual costs over estimated costs); Automation, Inc., NASACAB, 3 ECR para. 34 (1974). Other measures of recovery, however, have been used by the boards. See, e.g., Sysdyne, Inc., NCAB, 3 ECR para. 101 (1977) (loss on contract). Where relief is sought based upon "essentiality" the measure of relief is that amount necessary to assure contract completion or maintenance of the contractor as a Government source. Cincinnati Electronics Corp., ACAB 1185, 3 ECR para. 71 (1970).

<sup>547</sup>FAR 50.203(c).

<sup>548</sup>O'Roark, supra note 522 at 53 (noting that it has been the implied, if not express, policy of the Army, Air Force and Navy CAB's that the concept of stare decisis is largely inapplicable to decisions regarding relief under 85-804).

in two cases despite the presence of sovereign acts.<sup>549</sup> In Advance Maintenance Corp.,<sup>550</sup> the Services Contract Act of 1965 became applicable to employees of the contractor's to whom it previously had not applied. The Department of Labor (DOL) had not, however, determined the wage rate for the newly covered employees. The contracting officer had informed the contractor of the applicability of these provisions before awarding the contract and had requested verification of the contractor's bid. The board determined that the wage rates determined by DOL exceeded the wage rates proposed by either the contracting officer or the contractor. The board concluded that "under the peculiar circumstances of this case, it would be inequitable to require the [contractor] to assume entirely the financial risk of DOL's rendering post-award determinations in excess of the levels which the [contractor] should reasonably have contemplated at the time of award."<sup>551</sup>

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<sup>549</sup>Arguably, in both cases the relief was not based upon a sovereign act, but upon a different basis despite the presence of a sovereign act. See Advance Maintenance Corp., supra note 521. A similar conclusion can be drawn about the only other case in which a sovereign act was involved but relief was nevertheless granted. See Atlas Coverall and Uniform Supply Co., supra note 521 (Government's failure to order estimated quantities in a requirements contract).

<sup>550</sup>Supra note 521.

<sup>551</sup>2 ECR para. 111 at 8. The rationale provided by the board lends itself to a mutual mistake theory, which is an express basis for adjustment and is currently provided for by FAR 50.302-2, and was previously provided for in DAR 17-204.3. Cf., La Calesa Enterprises, AFCAB 240, 3 ECR para. 133 (1979) (mutual mistake as to the number of manhours required to perform contract).

The second case in which relief was granted despite the presence of a sovereign act was Atlas Coverall & Uniform Supply Co.<sup>552</sup> In that case, under a requirements contract, the Government ordered less than 21% of the estimated quantity. The reason for ordering so few supplies was that the base was closing and the contracting agency delayed awarding the contract. Without identifying the basis for granting relief, the Air Force Board granted the contractor an adjustment to cover the loss.<sup>553</sup> The results in these two cases indicate that in exceptional cases the Air Force Board has granted relief despite the effects of a sovereign act.

A final possibility for relief lies in the residual powers of 85-804. FAR 50.400 defines the term "residual powers" as "all authority under the Act except [contract adjustments] and the authority to make advance payments." The authority to approve such relief appears to have been retained by the Secretaries or agency heads and not generally delegated to the contract adjustment boards.<sup>554</sup>

Some question may exist regarding the availability of this

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<sup>552</sup>Supra note 521.

<sup>553</sup>This case represents an excellent example of a board awarding relief in the interests of fairness, without identifying its justification. Such results produce a type of "visceral justice." Cf., C.S. Smith Training, Inc., DOT CBA No. 85-804-15, 1984 DOTBCA Lexis 39, at \*16 (1984) (while denying relief because no unfairness was shown by contractor, the board noted that in granting relief under 85-804 for Government actions considerations of fairness are "overriding").

<sup>554</sup>Anthony, supra note 523 at 1024.

method of granting relief given the language of the FAR clause relating to 85-804, which addresses indemnification for "unusually hazardous or nuclear risks." On the other hand, FAR subpart 50.4 addresses the general residual powers and those relating to "unusually hazardous or nuclear risks" in separate, albeit related, sections. This separation may indicate that the latter are simply a special category under the residual powers of the act. The absence of decisions regarding the relationship, makes the final outcome uncertain, but the breadth of the term "residual powers" tends to indicate that such powers are not limited to cases involving "unusually hazardous or nuclear risks."

Even if the residual powers do not cover the effects of a sovereign act, there is no logical insurmountable barrier to a contract adjustment board granting relief under the Government action category.<sup>55</sup> Such relief would be inherent in the

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<sup>55</sup>This conclusion is based upon the other equitable uses to which 85-804 has been put. Most notably those situations where relief has been granted after the Government exercised an option on a contract knowing that the contractor would suffer a serious loss on the option quantity. See, e.g., Medico Industries, Inc., supra note 546; Centron Corp., ACAB 1151, 2 ECR para. 204 (1973). The obvious rejoinder to this position is that under Jones v. United States, supra 512, the United States cannot be held liable directly or indirectly for its sovereign acts. The problem with this argument is that relief under 85-804 does not constitute liability on the part of the Government, but rather a payment by the Government in order to avoid future difficulties in acquiring its needed goods. Thus, it represents a "pay now or pay later" situation. In either case the Government will find itself paying. Cf., Drexel Industries, Inc., 3 ECR para. 60 (1975) (Assistant Secretary of Defense authorized amendment without consideration to avoid cost of obtaining another contractor).

board's function and purpose:

"Just as in England, the Chancellor was the keeper of the King's conscience, empowered to mitigate the harshness of the common law when circumstances warranted, so it is that ... Contract Adjustment Board[s] serve[] to assure that no shocking injustice results from [an agency's] contracting."<sup>556</sup>

Where a sovereign act produces a "shocking injustice" the boards, in fulfilling their roles as keepers of the Government's contracting "conscience," should not hesitate to mitigate the often harsh effects of a sovereign act. Having said this, reality remains that under the FAR<sup>557</sup> and prior decisions of the CAB's, to the extent the latter serve as non-binding guidelines, relief from losses precipitated by a sovereign act are not subject to relief under 85-804.

#### **D. MISCELLANEOUS THEORIES OF RECOVERY BEYOND THE CONTRACT**

While the three preceding theories of recovery are the primary methods by which contractors have sought relief from the losses caused by a sovereign act, at least two other theories merit brief comment. The first, which has been consistently unsuccessful, is the theory of a contract implied in law. The second, which is related to the first and to the Government's duty of good faith and fair dealing, is that if the Government can accede to the inclusion of a contract clause granting relief for the effects of a sovereign act, then perhaps the courts or

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<sup>556</sup>C.S. Smith Training, Inc., supra note 553 at \*22.

<sup>557</sup>50.302-1(b) (the character of the Government action will generally determine whether an adjustment to the contract is appropriate).

boards can imply such a clause.

### 1. CONTRACT IMPLIED IN LAW

Recovery under this theory is not cognizable against the Government in the Claims Court under the Tucker Act<sup>558</sup>, nor before the boards of contract appeals.<sup>559</sup> It is possible, however, for the Claims Court to decide the merits of a claim based upon an implied in law contract theory where the jurisdictional limits of the Tucker Act, i.e. that the claim be based upon an express or implied in fact contract, have been waived<sup>560</sup> under a congressional reference.<sup>561</sup>

In order to establish an entitlement under this theory the plaintiff must show that the Government was unjustly enriched or that fraud, misrepresentation, mistake, or the like, has affected the relationship between the parties.<sup>562</sup> Many of these bases for recovery have been subsumed under the factors discussed above,<sup>563</sup> rendering recourse to this theory unnecessary.

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<sup>558</sup>Merrit v. United States, 267 U.S. 338 (1925); A.L. Rowan & Son v. Dept. of Housing, 611 F.2d 997 (5th Cir. 1980).

<sup>559</sup>Aden Music Co., ASBCA No. 28255, 87-3 BCA para. 20,113 (1987); J. Brinton Rowdybush, ASBCA No. 24955, 83-1 BCA para. 16188 (1983).

<sup>560</sup>See, e.g., Borg-Warner Corp. v. United States, 117 Ct. Cl. 1, 89 F. Supp. 1013 (1950) (reference expressly provided that the court was to consider the merits of plaintiff's claim under the theory of implied in law contract).

<sup>561</sup>See supra Section V(B).

<sup>562</sup>Borg-Warner Corp. v. United States, supra note 559, 117 Ct. Cl. at 28-29.

<sup>563</sup>See supra Section IV.

With regard to unjust enrichment, the question is whether the Government has in reality been unjustly enriched when the effect of a sovereign act merely renders performance more expensive or more difficult. After all, the Government has simply obtained the item for which it originally contracted. Thus, by and large, recourse to a contract implied in law is unavailable, in many cases unnecessary, and in all reported cases unsuccessful.

## **2. IMPLYING A DUTY TO COMPENSATE FOR THE EFFECTS OF A SOVEREIGN ACT**

In addressing this theory one point must be kept in mind, it is strictly theoretical and to date untried. The theory is based upon the idea that the Government has a duty of good faith and fair dealing<sup>564</sup> and that the failure to pay for the effects of a sovereign act is contrary to that duty. Furthermore, assertions that the Government would suffer immeasurably from the imposition of such a duty to compensate<sup>565</sup> is of questionable validity, at this point.<sup>566</sup>

The validity of the intolerable burden argument has been undercut by the fact that the Government has entered into contracts containing express promises to pay for the losses

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<sup>564</sup>See supra Section IV(A).

<sup>565</sup>See supra Section II(B)(1) to the effect that imposing a duty to pay would constitute an intolerable burden upon the public fisc.

<sup>566</sup>See Latham, The Sovereign Act Doctrine In The Law Of Government Contracts: A Critique And Analysis, 7 U. Tol. L. Rev. 29, 38 (1975) (observing that in no other area of the law is the burden on the public treasury a valid reason for absolving the Government from fiscal liability).

incurred as a result of a sovereign act<sup>567</sup> and the courts and boards have found implied promises to the same effect.<sup>568</sup> Thus, if the Government has the authority and has entered into such agreements, equity and the national interest should not suffer if the duty were otherwise imposed.<sup>569</sup> With this obstacle out of the way, the issue becomes what is the source of such a duty?

The duty to cooperate, as discussed above,<sup>570</sup> is part of the duty of good faith and fair dealing set forth in the Restatement 2d, Contracts, section 205, under the topical heading of "Considerations of Fairness and the Public Interest." Comment d, of section 205, opines that the obligation of good faith performance "may require more than honesty." One example of "bad faith" is "interference with or failure to cooperate in the other party's performance."

Under the "dual capacity" theory and the case law relating to the duty to cooperate, the critical issue in resolving liability tends to be whether the sovereign act is the product of the other contracting party.<sup>571</sup> This focus, however, is incorrect insofar as the effect of the sovereign act on performance of the contract is concerned. The contractor is not

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<sup>567</sup>See supra Section IV(B).

<sup>568</sup>See supra Section IV(C).

<sup>569</sup>It is difficult to make a colorable argument that implying such a duty is against the national interest when the Government has, of its own volition, effected the same result.

<sup>570</sup>See supra Section IV(A).

<sup>571</sup>See supra Section IV(A) (2).

hesitant to perform because of the requirements imposed by the sovereign act, but rather because of the increased costs of performance. Therefore, it is the failure of the contracting agency to pay increased costs of performance that interferes with performance, not the sovereign act itself. Thus, at least theoretically, the party interfering with performance is not the nonparty interfering agency, but the contracting agency. Assuming arguendo that this summary is correct, the contracting agency, not the agency initiating the act, has violated the implied duty to cooperate in performance.<sup>572</sup>

In addition to accepting that the interference is the failure to pay and not the sovereign act itself, there are at least two difficulties with this theory. First, in essence, implying such a duty constitutes indirect liability on the part of the Government for its sovereign acts, which is prohibited by the sovereign acts doctrine. This difficulty, however, is no different than that which has proven to be no barrier where the Government has otherwise impliedly promised to pay for the effects of a sovereign act.

The second difficulty is that implying such a clause resembles an implied in law contract. The failure of this

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<sup>572</sup>While no case law or comments have been discovered expressly addressing this somewhat novel approach, it impliedly underlies the cases where the courts and boards have found an implied promise to pay for the effects of a sovereign act. See, e.g., Old Dominion Security, ASBCA No. 40062, 91-3 BCA para. 24,173 (1991) (implied availability of sufficient security clearances to perform contract without use of overtime pay constituted a promise to pay for overtime when different agency limited the number of clearances available to the contractor).

argument lies in the fact that a contract exists and as such need not be implied. The only thing which would be implied by law is the clause requiring compensation for the effects of a sovereign act. In reality, implying such a clause is effectively no different than the result obtained in implying the other duties that constitute part of every contract, Government or private.<sup>573</sup>

As the above four sections have demonstrated, the availability of remedies to recover the costs incurred as a result of a sovereign act are extremely limited. The nature of the contractual relationship between the Government and its contractor, the nature of sovereign acts effecting contracts and the type of "property" involved all militate against recovery under a Fifth Amendment "taking" theory. While some relief may be available through a congressional reference case, the apparent practical requirement of enlisting the support of a member of Congress to propose the legislation has prevented its use on a wide scale. The general rule that relief is not available under Pub. L. 85-804 for the effects of a sovereign

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<sup>573</sup>The duties of good faith and fair dealing, and those duties that fall within its coverage, are in fact implied by law. The duty proposed here is no different. Instead, the real obstacle to this theory is accepting that the interference is not the sovereign act per se, but rather the failure to pay for the increased costs of performance. That contractors are unconcerned with increased contractual requirements is evidenced by the absence of complaints regarding contractual changes that increase the contract price. In effect, a sovereign act represents merely one more increased requirement which, because it does not change the physical work, does not constitute a change under the FAR "changes" clause.

act, except in very few exceptional cases, makes utilization of that method all but futile. As to contracts implied in law, neither the courts nor boards have jurisdiction to grant relief under that theory. Finally, while a plausible argument can be made that the contracting agency's failure to compensate for the effects of a sovereign act violates that agency's duty of co-operation, the theory is untested. Thus, without employing hyperbole, it generally takes an act of Congress to obtain relief from the financial losses visited on the contractor by a sovereign act.

#### **VI. GUIDE TO CURRENT STATE OF THE LAW**

During the more than 100 years in which the doctrine has been applied it has evolved to the extent that sovereign acts can generally be identified, albeit not without questions in the close cases. The only method by which this writer has been able to reconcile the ostensibly conflicting decisions and appreciate the intricacies of identification has been by concentrating upon the considerations that the courts and boards have employed in determining whether a particular governmental act qualifies for protection under the doctrine. This section provides a summary of those indicia in terms that can serve as a guide for Government attorneys confronted with a situation that lends itself to the defense and for contractors' attorneys confronted with an assertion that the doctrine precludes governmental liability. Whether a particular governmental act is entitled to the protection of the doctrine is generally dependent upon three consider-

ations: the interfering act itself; the identity of the interfering actor; and, the presence of factors that otherwise prevent protection.

#### **A. THE ACT**

In order to qualify for protection under the doctrine, the act must have been taken in the Government's sovereign capacity and not in its contractual capacity. Acts in the Government's sovereign capacity are usually found where the act was of wide spread application in furtherance of a national purpose. If less widely applicable, protection may be afforded if the act effected everyone similarly situated to the contractor and was in furtherance of an important national purpose. Thus, acts relating to environmental regulation,<sup>574</sup> regulation of competition,<sup>575</sup> economic controls and fiscal policy,<sup>576</sup> resource allocation,<sup>577</sup> and special permit requirements<sup>578</sup> are of such wide spread application that, absent contractual language to the contrary, the Government is not financially responsible for the effects of the sovereign act.<sup>579</sup>

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<sup>574</sup>See supra Section III(C)(1)(a)(i).

<sup>575</sup>See supra Section III(C)(1)(a)(ii).

<sup>576</sup>See supra Section III(C)(1)(a)(iii).

<sup>577</sup>See supra Section III(C)(1)(a)(iv).

<sup>578</sup>See supra Section III(C)(1)(a)(vi).

<sup>579</sup>One point which must be kept in mind during times of shrinking budgets is that the motivation to save money is an insufficient national purpose to grant the act protection of the doctrine. See supra Section III(D). Also see Hughes Communications Galaxy, Inc. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 91-

Where the act in question does not have such wide spread application, the focus will invariably shift to the importance of the act<sup>580</sup> and whether it was directed at the contractor or his contract.<sup>581</sup> In such cases, assuming a national interest,<sup>582</sup> protection of the doctrine will be afforded if the act in question affects everyone similarly situated to the contractor.<sup>583</sup> Protection of the doctrine, however, will not be afforded to acts of the sovereign, despite the wide spread application of the act or its furtherance of a national interest, if the sole governmental purpose is to "reverse a previous policy decision later deemed unwise."<sup>584</sup> Thus, where

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1032C, slip op. at 25 (April 13, 1992) ("acts that are motivated primarily by a desire to save money do not provide a defense" under the sovereign acts doctrine).

<sup>580</sup> Winstar Corp. v. United States, \_\_\_ Cl. Ct. \_\_\_, No. 90-8C, 1992 U.S. Cl. Ct. Lexis 135 (April 21, 1992) (where the act in question is not literally "'general' in application, emphasis has been placed on the compelling 'public' nature of the act") (citing Wah Chang Corp. v. United States, 151 Ct. Cl. 41, 282 F.2d 728 (1961)) (emphasis added).

<sup>581</sup> Even the most important national purpose, see supra Section III(D), however, will not render the act protected if it is directed at either a specific contractor or contracts. See supra Section III(B) (2).

<sup>582</sup> There appears to be a presumption that if Congress enacts legislation or if a different agency promulgates a regulation, the action was done in furtherance of the national interest or general welfare. See supra Section III(D).

<sup>583</sup> See supra Section III(B).

<sup>584</sup> Winstar Corp. v. United States, supra note 579 (citing, *inter alia*, Freel[dm]an v. United States, 162 Ct. Cl. 390, 320 F.2d 359 (1963)). The rationale underlying this position is that in such cases the governmental act is directed at the contract and violates the requirement that any effect on the contract or contractor from a sovereign act be indirect. Also

the governmental act is such that the contractor was effected indirectly, just as was everyone else, then protection of the doctrine will apply.<sup>585</sup> To provide otherwise would give the contractor an advantage not shared by his private commercial counterparts, vis-a-vis the effects of the act, simply because his contract was with the Government; a result the doctrine is designed to avoid.<sup>586</sup>

#### **B. THE IDENTITY OF THE ACTOR**

In deciding whether the Government is acting in its sovereign or contractual capacity, the courts and boards have focused upon the contractual relationship between the contractor and the interfering agency. Thus, the identity of the interfering agency/actor is significant. This consideration is directly related to whether the act in question is "public and general." The underlying rationale appears to be that agency acts that affect only the contracts of that agency are less likely to possess the wide scale application necessary to qualify as a "public and general" act.

Where the act in question was initiated by an agency or governmental entity other than the contracting agency, absent a "significant bond" between the initiating agency and the contracting agency,<sup>587</sup> the act in question will generally be

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see Section III(B) (2).

<sup>585</sup>See supra Section III(B).

<sup>586</sup>See supra Section II(B) (2).

<sup>587</sup>See supra Section III(C) (1) (b).

entitled to protection under the doctrine.<sup>588</sup> Where substantial discretion has been vested in the contracting agency in implementing the act of another agency, there is disagreement over whether protection obtains.<sup>589</sup> The existence of substantial discretion may what initially was an act of a different agency into a contracting agency act, thereby reducing the likelihood of protection under the doctrine.<sup>590</sup>

Where the interfering act is that of the contracting agency, resolution of the entitlement to protection often depends upon whether the agency was implementing the acts of a different governmental entity or acting independently. In the former case, assuming that the act was within the authority of the initiating agency and was not arbitrary and capricious,<sup>591</sup> the act will generally be entitled to protection.<sup>592</sup> In the

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<sup>588</sup>See supra Section III(C)(1).

<sup>589</sup>See supra Section II(C)(1)(a)(v).

<sup>590</sup>The most frequent occurrence of this issue is in the area of contract funding. See supra Section III(C)(1)(a)(v). The boards and courts disagree upon the effect of the contracting agency discretion in funding its contracts, where there are insufficient funds to fully fund all contracts. Generally, where the contracting agency has requested sufficient funds to fully fund its contracts, but Congress appropriates less than that amount, protection will attach as long as the contracting agency does not abuse its discretion in allocating the appropriated funds. But see, DWS, Inc., ASBCA No. 33245, 87-3 BCA para. 9762 (1987) (while denying the appeal on other grounds, the Board opined that contracting agency discretion in allocating reduced funds prevented the shortage from being attributed to Congress).

<sup>591</sup>See supra Section IV(E).

<sup>592</sup>See supra Section III(C)(2)(ii).

latter case, independent acts by the contracting agency, the determination depends upon whether the authority to initiate the act was unique to the agency.<sup>593</sup> Where the authority to initiate the interfering act is vested in the contracting agency, protection will obtain.<sup>594</sup> The rationale for this result is found in the second purpose of the doctrine, which is to promote effective government by the insuring that the appropriate governmental agency acts, unhindered by its contractual obligations.<sup>595</sup> Where the contracting agency is not implementing the sovereign act of a different agency or the act is not agency unique, the availability of protection becomes problematic and is largely dependent upon whether the contracting agency has violated one of its implied duties under the contract.<sup>596</sup>

A third possible actor in the sovereign acts scenario is the contracting officer. The general rule is that as long as the contracting officer acts merely as a conduit for an otherwise protected sovereign act, the act will not lose its protection.<sup>597</sup> There is some disagreement with this rule by the Armed Services Board of Contract Appeals. That Board maintains that acts by the contracting officer, specifically addressed to the

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<sup>593</sup>See supra Section III(C)(2)(i).

<sup>594</sup>See supra Section III(C)(2)(a)(i).

<sup>595</sup>See supra Section II(B).

<sup>596</sup>See supra Section IV(A)(iii).

<sup>597</sup>See supra Section III(C)(2)(b)(ii).

contractor, irrespective of the underlying basis for the act, constitute almost conclusive proof that the act in question was a contractual act, rather than a sovereign act.<sup>598</sup>

Thus, where the interfering agency is an agency other than the contracting agency or where the contracting agency is effectuating its unique authority and, in either case, the act is not directed at a particular contractor or contract, the courts and boards will find that the act in question is a sovereign act entitled to protection under the doctrine.

### **C. FACTORS RENDERING PROTECTION UNAVAILABLE**

Generally, the fact that the Government has performed a sovereign act is easily ascertainable. The disagreement arises over whether the act is protected by the doctrine. Even if the above criteria are satisfied, there are three primary factors that will render the doctrine ineffective in protecting the Government from liability for its act. Those factors are: (1) violation of implied contractual duties; (2) the presence of an alternative course of action that would not have interfered with the Government's contractual obligations; and, (3) implied or express contractual language permitting recovery for the effects of a sovereign act.

#### **1. CONTRACTUAL DUTIES**

One of the most significant limitations upon the availability of protection for a governmental act is the effect of the implied contractual duties owed by the Government to its con-

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<sup>598</sup> Id.

tractors. These duties generally exist only between contracting parties, which, under the theory of "dual capacity"<sup>599</sup> limits their effect to the contracting agency. Where the contracting agency fails to fulfill one of these duties, the doctrine will not shield the Government from liability.<sup>600</sup> The underlying rationale for overriding the protection of the doctrine in such cases is that the sovereign acts doctrine will not shield the Government from liability for actions that it has specifically undertaken. The most noteworthy of these duties are the duties to cooperate<sup>601</sup> and the duty to disclose material facts.<sup>602</sup>

The former duty requires that the contracting agency do nothing to hinder performance. Where this duty is violated by the contracting agency, protection of the doctrine is not available. Exceptions exist, however, where the contracting agency is effecting its unique responsibilities. For example, if the Environmental Protection Agency were to ban the use of a particular chemical and that ban affected the performance of one of its contractors, the act would qualify for protection under the doctrine, given the fact that no other agency had the authority to perform the act in question.

A second aspect of the duty to cooperate requires that the Government fulfill with reasonable diligence those responsi-

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<sup>599</sup>See supra Section II(A)(1).

<sup>600</sup>See supra Section IV(A)(2).

<sup>601</sup>See supra Section IV(A)(3)(b).

<sup>602</sup>See supra Section IV(A)(3)(b).

bilities that it has undertaken. Thus, where the Government has undertaken to provide certain necessary material to a contractor and then fails to take reasonable actions to provide that material due to the existence of, for example, a resource allocation system, the Government is liable for the effects of is violated by the contracting agency, the doctrine will not shield the Government from liability for the effects of a sovereign act.

## **2. ALTERNATIVE COURSE OF ACTION**

While the Government is entitled to take sovereign acts and to enjoy protection from liability for the effects of those acts, it is not free to act willy-nilly. If there is an alternative course of action that the Government could have taken to secure the results intended by the act, without disturbing the contractor's rights under the contract, the sovereign acts doctrine will not shield the Government from liability.<sup>603</sup> The rationale underlying this principle is that the sovereign acts doctrine protects only those acts of the Government which are necessary and justified, but which interfere with its contractual obligations. If an alternative course of action would have avoided the contractor's injury, then the chosen course was neither necessary nor justified.

## **3. EXPRESS OR IMPLIED CONTRACTUAL PROMISE TO PAY**

The rights and obligations of the parties to a Government contract, as with most contracts, are governed by the contract.

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<sup>603</sup>See supra Section IV(F).

Thus, where the Government has expressly agreed to compensate the contractor for the effects of a sovereign act, the doctrine will not prevent liability from attaching.<sup>604</sup> Additionally, where such a promise can be implied from the contract documents, the doctrine will not shield the Government from liability.<sup>605</sup>

## **VII. CONCLUSION**

As the preceding material reflects, the sovereign acts doctrine attempts to balance the Government's contractual duties and obligations against its responsibilities as a sovereign. There is a natural tension within the doctrine that, if left unattended, can unbalance the scales irretrievably against the private citizen. As the Claims Court recently opined:

"Given both the federal government's preeminent position as a governing institution in our democracy, as well as the enormity of its impact in terms of buying and selling goods and services, the risk is great that, under the guise of governing, it could unfairly influence the market phenomena to its own advantage. . . . The defense is thus not without limits."<sup>606</sup>

The existence of a sovereign act and its protection is not difficult to ascertain. The difficulty lies in determining the limits of the latter. The preceding pages have been an attempt to define the doctrine and ascertain its limits. In so doing, the intricacies of the doctrine, as applied by the courts and boards, have been brought to the surface. If the rationale

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<sup>604</sup>See supra Section IV(B).

<sup>605</sup>See supra Section IV(C).

<sup>606</sup>American Satellite Co. v. United States, \_\_ CL. Ct. \_\_, No. 525-89C, slip. op. at 10 (April 13, 1992).

below the surface is not considered, the result is ostensible inconsistency. There are true inconsistencies in the application of the doctrine, but by and large they are the exceptions.

One factor which appears to play an increasingly important role in applying the doctrine is the existence of a contractual relationship between the contractor and the interfering governmental actor. This factor, which arguably played no role in the original formulation of the doctrine, has assumed its present stature largely due to the increased emphasis upon the Government's implied duties under the contract. Whether this increased emphasis is the result of the Government performing more "nonessential" acts, and therefore being treated more like any other commercial participant, or merely the more widespread imposition of the duties generally, is uncertain. The effect of the duties, however, is clear: absent the performance of essential and obviously sovereign acts, the nature of the contractual relationship between the Government and its contractors more closely resembles that of its private counterparts.

The greatest failing of the doctrine is its treatment of all governmental acts as sovereign acts, regardless of whether they are necessary to the existence of the sovereign. The issue, in many cases, has become whether the governmental act should be shielded, not whether the sovereign act of the Government is entitled to protection. Where the doctrine applies, the contractor is left largely without recourse. Where this result is mandated for the national good, it does not offend any

general sense of justice. Where the purpose is something less, the issue is not so clear.

Given the sheer power of the Government, both as a sovereign and as a participant in commerce, the danger exists that a short-term saving, i.e. avoiding liability for a particular act, may undermine long-term strength. The undercutting of strength results from abusing the protection provided by the doctrine, i.e. shielding governmental acts rather than protecting sovereign acts. If such abuse is permitted, the Government may be perceived as taking unfair advantage of its position as sovereign. If this perception becomes widespread, there should be little doubt that only those with no other option will choose to participate in Government procurement. Such an eventuality would cost far more than any savings ever realized by application of the doctrine.